(c) Notify appointing authorities of any and all vacancies on the Standards Board.

ii. Recordkeeping and Administration. The DFO shall:

(a) Maintain records for all meetings, including subgroup or working group activities, as required by law.

(b) Maintain the roll.

(c) Assure that minutes of all Standards Board and Executive Board meetings, including subgroup and working group activities are prepared and distributed.

(d) House at the EAC and maintain official Standards Board records, including subgroup and working group activities.

(e) Filing all papers and submissions prepared for or by the Standards Board, including those items generated by subgroups and working groups.

(f) Respond to official correspondence.

(g) Prepare and handle all reports, including the annual report as required by FACA.

(h) Acting as the Standard Board's agent to collect, validate, and pay vouchers for pre-approved expenditures.

Article VII. Meetings

1. Pursuant to Sections 215(a)-(c) of HAVA, the Standards Board shall hold a meeting of its members:
   a. At such times as it considers appropriate for the purposes of conducting such business as it considers appropriate under HAVA.
   b. In any event, not less frequently than once every two (2) years for purposes of selecting the Executive Board.
   c. For the purposes of voting on voluntary voting system guidelines referred to it under Section 222 of HAVA, not less frequently than once every year.
2. Meetings shall be called by the DFO in consultation with the Executive Board.
3. The DFO shall approve the agenda for all meetings. The EAC shall distribute the agenda to Standards Board members prior to each meeting and shall publish notice of the meeting in the Federal Register as required by FACA.
4. Standards Board members and members of the public may submit agenda items to the DFO or Executive Board Chair.
5. Meetings.
   a. Open Meetings.
      i.
      ii.
   b. Closed Meetings.
   c. Unless otherwise determined in advance, all Standards Board meetings will be open to the public.
   d. Once an open meeting has begun, it will not be closed unless prior approval of the closure has been obtained and proper notice of the closed session has been given to the public.

Formatted: Indent: Hanging: 0.5", Numbered + Level: 3 + Numbering Style: i, ii, iii, ... + Start at: 1 + Alignment: Right + Aligned at: 1.38" + Tab after: 1.5" + Indent at: 1.5"

Deleted: ¶ Maintaining records for all meetings, including subgroup or working group activities, as required by law.

Deleted: ing

Deleted: i

Deleted: ng

Deleted:

Deleted: Housing

Deleted: ing

Formatted: Bullets and Numbering

Deleted: B

Deleted: ¶

Deleted: Responding to official correspondence. ¶ <#>Acting as the Standard Board's agent to collect, validate, and pay all vouchers for pre-approved expenditures. ¶ <#>Preparing and handling all reports, including the annual report as required by FACA.¶

Deleted: The

Deleted: meet as required, but not less frequently than once every 2 years for the purposes of selecting the Executive Board

Deleted: .

Deleted:

Deleted: <#>All meetings of the Standards Board shall be conducted in accordance with Roberts Rules of Order.¶ Open/Closed

Formatted: Bullets and Numbering

Formatted: Indent: Left: 1", Hanging: 0.5"

Formatted: Bullets and Numbering

e. Notices of closed meetings will be published in the Federal Register at least 15 calendar days in advance.

f. If, during the course of an open meeting, matters inappropriate for public disclosure arise during discussions, the Chair will order such discussion to cease and will schedule it for closed session.

g. All materials brought before, or presented to, the Board during the conduct of an open meeting, including, but not limited to, the minutes of the proceedings of the previous open meeting, will be available to the public for review or copying at the time of the scheduled meeting.

h. Members of the public may attend any meeting or portion of a meeting that is not closed to the public and may, at the determination of the Chair, offer oral comment at such meeting. The Chair may decide in advance to exclude oral public comment during a meeting, in which case the meeting announcement published in the Federal Register will note that oral comment from the public is excluded. In such a case, the Standards Board will accept written comments as an alternative. In addition, members of the public may submit written statements to the EAC at any time.

i. Standards Board meetings will be closed only in limited circumstances and in accordance with applicable law. The Standards Board must obtain prior approval to conduct a closed session. Requests for closed meetings must be submitted to EAC's Office of General Counsel a minimum of 45 days in advance of the proposed closed session.

j. Where the DFO, in conjunction with the Office of General Counsel, has determined in advance that discussions during a Standards Board meeting will involve matters about which public disclosure would be harmful to the interests of the government, industry, or others, an advance notice of a closed meeting, citing the applicable exemptions of the Government in the Sunshine Act (GISA), shall be published in the Federal Register. The notice may announce the closing of all or just part of a meeting.

open closed

6. Minutes.

a. The DFO or his or her designee, shall assure that detailed minutes of each minute are prepared and distributed to Standards Board members.

b. Minutes of open meetings shall be available to the public upon request. Minutes of closed meetings shall be available to the public upon request, subject to the Freedom of Information Act (FOIA).

c. Meeting minutes shall include the following: (1) Time, (2) date, (3) location, (4) record of persons present, including the names of Standards Board members, staff, and the names of members of the public making written or oral presentations, (5) a complete and accurate description of the matters discussed and conclusions reached, and (6) copies of all reports received, issued, or approved by the Standards Board.

d. All documents, reports, or other materials prepared by or for the Standards Board constitute official government records and will housed at the EAC and maintained according to the Federal Records Act.

– part of record

Deleted: ¶

Formatted: Indent: Left: 0.25", Hanging: 0.26", No bullets or numbering

Deleted: ¶

Deleted: ¶

Deleted: ¶

Article VIII. Quorum and Proxy Voting

~~Omit 2 sections~~

Break out by 1 + 2

1. A quorum shall be established when fifty percent (50%) plus one of Standards Board members is present for a meeting or are present by proxy.
    a. ~~Only other Standards Board members may declare another Standards Board member present by proxy.~~
    b. Proxy designations may be submitted in writing to the Chair up to the day of the Standards Board meeting.
2. The Standards Board shall agree to actions by majority vote of those present and voting unless otherwise specified by these bylaws.
3. Proxy votes may only be cast by Standards Board members, provided proxy designations have been timely filed in advance with the Chair clearly identifying the Standards Board member to cast an absent member's proxy vote.
4. The Chair shall appoint a proxy committee to verify the eligibility of proxy votes.
5. Voting procedures for the Standards Board, the Executive Board, and the subcommittees will follow the accepted procedure, in the latest edition of Robert's Rules of Order. Votes by the Standard Board on recommendations to EAC shall have the ayes, nays, and abstentions recorded.

Article IX. Committees

In appointing members to committees, the Standards Board shall pay particular attention to ensuring diverse membership. Accordingly, the Executive Board shall do due diligence to ensure that committee members (1) affiliate with diverse parties, (2) are representative of both state and local election officials, (3) represent different states and territories, and (4) are representative of both elected and appointed officials.

1. Meetings.
    a. All committees may meet informally at any time for the purpose of conducting their business, including telephonically or through electronic media.
2. Standing Committees.
    a. Nominating Committee. The Nominating Committee shall:
        i. Be comprised of five (5) members.
        ii. Solicit nominations for the Executive Board from Standards Board members.
        iii. Prepare and distribute to Standards Board members ballots that include all the information listed in Article V, section 1, subsection c, paragraph ii of these Bylaws.
    b. Bylaws Committee. The Bylaws Committee shall:
        i. Be comprised of seven (7) members.
        ii. ~~Be Chaired by the Parliamentarian.~~
        iii. Submit all recommended amendments to the Executive Board for a ~~two~~ seven (7) day comment period before submitting recommendations to the Standards Board for resolution and adoption.
3. Ad-Hoc Committees.
    a. The Standards Board may, at any time, by majority vote, establish an ad-hoc committee.

b. The Standards Board member wishing to establish an ad-hoc committee must present to the Standards Board the reason(s) he/she is requesting the committee.
c. Once an ad-hoc committee has been established, the Executive Board shall appoint members to the ad-hoc committee.
d. ~~No ad-hoc committee shall be comprised of more than ten (10) Standards Board Members.~~

Article X. Amendments

by a

The bylaws may be amended ~~based on a~~ two-thirds (2/3) vote of the members present and voting at any Standards Board meeting.

The Standards Board's Bylaws Committee shall promulgate a form for proposing an amendment to the Standards Board's Bylaws. The form shall require the specific language of the proposed amendment to be included, identify the author of the amendment, and be designed to elicit the rationale and impact ~~statement~~.

> create form for proposed amendment no later than December 1 or within the 30-day time frame provided by the Executive Committee. (Break up)

All proposed bylaw changes must be submitted in writing to the DFO, who shall thereafter forward the proposed changes to the Standards Board Bylaws Committee and the EAC's General Counsel.

a. The General Counsel shall report in an expeditious manner to the Bylaws Committee and the Executive Board whether or not a proposed change to the Bylaws is consistent with federal law and/or rules.

reorganize

Bylaws Comm.

The Standards Board's Executive Committee shall place the report on the proposed change to the Standards Board's Bylaws on the agenda for the next meeting of the Standards Board.

The Executive Board shall forward all proposed changes to Standards Board members at least thirty-five (35) days prior to the next meeting of the Standards Board via email and U.S. Mail to the applicable address of record on file with the EAC. The Executive Board shall request that EAC post the proposed change to the bylaws and all supporting material on EAC's website at least thirty-five (35) days prior to the next meeting of the Standards Board.

Article XI. Expenses and Reimbursement.

1. Expenses related to Standards Board operations will be borne by the EAC.
2. Expenditures of any kind must be approved in advance by the DFO.
3. Standards Board members shall not receive any compensation for their services, but shall be paid travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of federal agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in performance of their services for the Standards Board.

Article XII p. 561

~~Section XII.~~ **Effective Date**

Article XIII

1. These By-Laws are effective upon adoption by the Standards Board.

Article XIV

~~Section~~ **XII: Transition Procedures and Ratification**

b) Bylaws committee will transmit proposed bylaws committees to Executive Board

1. The adoption of the bylaws has no effect on the selection, terms or appointment of the officers or members of the Standards Board, the Executive Board, or a committee of the Board serving on the effective date of these bylaws.
2. All acts of the Standards Board, the Executive Board, or a committee of the Board are hereby ratified, except to the extent that an act does not conform with a resolution adopted by the Standards Board before the effective date of these bylaws.

date

chair

date

DFO

These bylaws were last updated 101006 (date) + supersede any previous versions.

Add: These bylaws consist of ___ pages. X

BYLAWS

UNITED STATES ELECTION ASSISTANCE COMMISSION STANDARDS BOARD

The U.S. Election Assistance Commission Standards Board, hereinafter referred to as Standards Board, embodies the vision of Congress to forge a partnership among federal, state and local election officials whose goal is to promote public confidence in the conduct of federal elections in the United States.

Article I. Authority

1. Pursuant to the Federal Advisory Committee Act and the Help America Vote Act of 2002 (HAVA) [Public Law 107-252], as such statutes may be amended from time to time, the Standards Board has been granted its authority through its charter with the United States Election Assistance Commission (EAC) (filed with Congress on June 14, 2004).

Article II. Objectives:

The Standards Board will:

1. Advise the EAC through review of the voluntary voting system guidelines described in Title II Part 3 of HAVA; through review of the voluntary guidance described under Title III of HAVA; and through the review of the best practices recommendations described in Section 241of Title II of HAVA, as required by HAVA or as may be developed by EAC.
2. Provide guidance and advice to the EAC on a variety of topics related to the administration of elections for Federal office.
3. Function solely as an advisory body and will comply fully with the provisions of the Federal Advisory Committee Act (FACA); and all other applicable Federal laws.

Article III. Standards Board Membership

1. Pursuant to Section 213(a) of HAVA, the Standards Board shall consist of 110 members, as follows:
   a. Fifty-five (55) shall be state election officials selected by the chief State election official of each State.
   b. Fifty-five (55) shall be local election officials selected as follows:
      ii. Each state's local election officials, including the local election officials of Puerto Rico and the United States Virgin Islands, shall select a representative local election official from the state in a process supervised by the chief election official of the state.
      iii. In the case of the District of Columbia, Guam, and American Samoa, the chief election official shall establish a procedure for selecting an individual to serve as a local election official. The individual selected under such a procedure may not be a member of the same political party as the chief election official.

c. The two Standards Board members who represent the same state may not be members of the same political party.

Article IV. Standards Board Member Vacancies

1. The chief election official of each state shall notify the EAC and Executive Board of the Standards Board within five (5) business days of any vacancy or membership changes to the Standards Board.
2. Vacancy appointments to the Standards Board shall be made in accordance with Section 213(a) of HAVA:
   a. Fifty-five (55) shall be state election officials selected by the chief State election official of each State.
   b. Fifty-five (55) shall be local election officials selected as follows:
      iv. Each state's local election officials, including the local election officials of Puerto Rico and the United States Virgin Islands, shall select a representative local election official from the state in a process supervised by the chief election official of the state.
      v. In the case of the District of Columbia, Guam, and American Samoa, the chief election official shall establish a procedure for selecting an individual to serve as a local election official. The individual selected under such a procedure may not be a member of the same political party as the chief election official.
   c. The two Standards Board members who represent the same state may not be members of the same political party.
3. In December of each year, the EAC shall notify the appointing authority of each state or territory who represents their state or territory on the Standards Board.

Article V. Executive Board of the Standards Board

1. Pursuant to Section 213(c) of HAVA, the Standards Board shall select nine (9) of its members to serve as the Executive Board of the Standards Board as follows:
   a. Membership.
      i. Not more than five (5) members of the Executive Board may be state election officials.
      ii. Not more than five (5) members of the Executive Board may be local election officials.
      iii. Not more than five (5) members of the Executive Board may be of the same political party.
   b. Nominations.
      i. Expired Terms.
         (a) The Nominating Committee shall solicit nominations for the Executive Board from Standards Board members. The Nominating Committee shall send to Standards Board members a solicitation no later than December 1st immediately prior to the expiration of any Executive Board member's term. The solicitations shall designate the address and form for submitting nominations.

(b) Standards Board members may nominate themselves or other Standards Board members by responding to the solicitation.

(c) Nominations shall be submitted to the Standards Board's Designated Federal Officer (DFO) in writing and may be submitted electronically no later than January 15.

(d) Upon receipt of nominations, the Nominating Committee shall prepare a ballot to be distributed to the Standards Board at least 15 days prior to the date of the Standards Board meeting immediately following the submission deadline.

ii. Vacancies Before the End of a Term.

(a) In the event of a vacancy on the Executive Board prior to the expiration of a member's term on the Executive Board, the Nominating Committee shall send to Standards Board members a solicitation no later than sixty (60) days before the next meeting of the Standards Board. The solicitations shall designate the address and form for submitting nominations.

(b) Standards Board members may nominate themselves or other Standards Board members by responding to the solicitation.

(c) Nominations shall be submitted to the Standards Board's Designated Federal Officer (DFO) in writing and may be submitted electronically no later than the date indicated on the solicitation.

(d) Upon receipt of nominations, the Nominating Committee shall prepare a ballot to be distributed to the Standards Board at least 15 days prior to the date of the Standards Board meeting immediately following the submission deadline.

c. Elections.

i. Elections to the Executive Board shall be by secret ballot and shall take place at a meeting of the Standards Board.

ii. The ballot shall be designed to enable Standards Board members to select candidates based on the following: (1) With which party the candidate affiliates, (2) whether the candidate is a state or local election official, (3) which state or territory the candidate represents, (4) whether the candidate was elected or appointed, and (5) in the case of state election officials, whether the candidate is a Secretary of State, a member of a Citizen Board, or a State Election Director. The ballot shall also include concise biographical information for each candidate.

iii. For nominations following the first election (2005), not including any special elections to fill unexpired terms, two (2) of the three positions shall be local election officials. For nominations following the second election (2007), two of the three positions shall be for state election officials. The number of state and local nominations shall continue to alternate in subsequent elections.

iv. Within thirty (30) days of an Executive Board election, the Executive Board members shall convene to elect a Chair, Vice-Chair, Secretary, and Parliamentarian.

d. Executive Board Members Terms of Service and Vacancies.

i. Generally.

(a) The Chair of the Executive Board shall notify the EAC and Nominations Committee Chair within five (5) business days of any vacancy on the Executive Board.

(b) The Chair, Vice-Chair, and Secretary, shall not serve for a term of more than one (1) year. An Executive Board member shall not serve for two (2) consecutive terms for the same office, except in the case of a member serving the unexpired term of an office, in which case the member may be elected to the same office for the succeeding terms.

(c) An Executive Board member may be removed from the Executive Board for cause by a vote of two-thirds (2/3) of Standards Board members at a Standards Board meeting.

(d) In the event of a vacancy in the Executive Board, the remaining members of the Executive Board may appoint an interim member of the Executive Board until the next Standards Board meeting.

(e)

ii. Initial Term.

(a) Pursuant to Section 213(c)(3) of HAVA, of the members first selected to serve on the Executive Board of the Standards Board:

(i) Three (3) shall serve for one (1) term.

(ii) Three (3) shall serve for two (2) consecutive terms.

(iii) Three (3) shall serve for three (3) consecutive terms.

iii. Subsequent Terms.

(a) Pursuant to Section 213(c)(2) of HAVA, members of the Executive Board shall serve for a term of two (2) years and may not serve for more than three (3) consecutive terms.

(b) Members of the Standards Board who have previously served on the Executive Board shall be eligible to be nominated to the Executive Board no sooner than two (2) years from the last term in which they served on the Executive Board.

c. Meetings.

i. Any two members of the Executive Board may call an Executive Board meeting by filing the original call of the meeting with the DFO, including the stated reason for calling the meeting.

ii. A majority of Executive Board Members shall be present for a quorum.

iii. The Executive Board shall agree to actions by a majority vote of the Executive Board.

iv. Proxy voting will not be allowed in Executive Board votes.

v. Any member of the Standards Board may attend and at the discretion of the Chair, may participate in any and all discussions at an Executive Board meeting, but may not vote.

vi. If the Executive Board decides to hold an open meeting, it shall do so in accordance with the requirements FACA.

Article VI. Executive Board Duties

1. Chair. The Chair shall:
   a. Preside over all meetings of the Executive Board and Standards Board.
   b. Appoint the chair of standing committees and any ad hoc committees of the Standards Board.
   c. Establish the agenda for meetings of the Executive Board and Standards Board in consultation with the DFO.
   d. Call meetings of the Executive Board and Standards Board in consultation with the DFO.
   e. Act as the official liaison between the Standards Board and the EAC for all resolutions, recommendations, and information requests.
   f. Serve as an *ex officio* member of all committees.
   g. Appoint a Parliamentarian to preside over all Standards Board meetings.
      i. The Parliamentarian shall provide advice and assistance to the Chair so that the Chair can run all meetings in accordance with Roberts Rules of Order.
2. Vice-Chair. The Vice-Chair shall:
   a. Preside over meetings of the Executive Board and Standards Board in the Chair's absence.
   b. Perform other duties as may be appropriate in the Chair's absence.
   c. Assist the Chair from time to time as the Chair may designate.
   d. In the event of a vacancy before the completion of the Chair's term, serve as the Chair.
3. Secretary. The Secretary shall:
   a. Review Executive Board minutes before distribution to Standards Board members.
   b. Ensure, with assistance from the DFO, that meeting minutes are properly on file.
   c. Assist the Chair at meetings and from time to time as the Chair may designate.
4. Executive Board, Generally. The Executive Board shall:
   a. Perform all duties required under HAVA and other applicable Federal law.
   b. Appoint the membership of appropriate standing committees and ad hoc committees by soliciting interest from the Standards Board membership.
   c. Meet as necessary to address issues of concern in between Standards Board meetings.
   d. Approve the minutes of the Executive Board meetings.
   e. Convene Standards Board meetings, including, but not limited to, meetings by conference call and virtual meetings. Such meetings must allow each Standards Board member to include their comments and view or hear others' comments.
   f. Consult with the DFO to ensure compliance with federal statutes and other applicable regulations.
   g. Attend Executive Board meetings, including, but not limited to, meetings by conference call and virtual meetings, in accordance with these bylaws. In the event that an Executive Board member fails to attend or participate in at least one (1) Executive Board meeting within the the preceding twelve (12) month period, such Executive Board member shall forfeit his or her position on the Executive Board, thereby creating a vacancy. Such vacancy shall be filled in accordance with these bylaws.
   h. As soon as possible, provide Standards Board Members all guidelines proposed to be adopted pursuant to Section 222(b)(3) of HAVA. Executive Board recommendations to the Standards Board pursuant to Section 222(b)(3) of HAVA shall include an

appendix of all dissenting comments from Executive Board members.

i. Perform all other duties as from time to time the Standards Board may delegate to the Executive Board.

j. Upon notice of an Executive Board meeting, the Executive Board shall notify the Standards Board of the Executive Board meeting.

5. Designated Federal Officer (DFO). The DFO shall:
   a. Serve as the government's agent for all Standards Board activities.
   b. Approve or call Standards Board meetings.
   c. Approve agendas proposed by the Executive Committee.
   d. Attend all Standards Board and Executive Board meetings.
   e. Adjourn Standards Board and Executive Board meetings when such adjournment is in the public interest.
   f. Provide adequate staff support to the Standards Board, to assist with:
      i. Notice. The DFO shall:
         (a) Notify members of the time and place for each meeting.
         (b) Upon notice of an open Executive Board meeting, notify the Standards Board and public of time and place for the meeting.
         (c) Notify appointing authorities of any and all vacancies on the Standards Board.
      ii. Recordkeeping and Administration. The DFO shall:
         (a) Maintain records for all meetings, including subgroup or working group activities, as required by law.
         (b) Maintain the roll.
         (c) Assure that minutes of all Standards Board and Executive Board meetings, including subgroup and working group activities are prepared and distributed.
         (d) House at the EAC and maintain official Standards Board records, including subgroup and working group activities.
         (e) Filing all papers and submissions prepared for or by the Standards Board, including those items generated by subgroups and working groups.
         (f) Respond to official correspondence.
         (g) Prepare and handle all reports, including the annual report as required by FACA.
         (h) Acting as the Standard Board's agent to collect, validate, and pay all vouchers for pre-approved expenditures.

Article VII. Meetings

1. Pursuant to Sections 215(a)-(c) of HAVA, the Standards Board shall hold a meeting of its members:
   a. At such times as it considers appropriate for the purposes of conducting such business as it considers appropriate under HAVA.
   b. In any event, not less frequently than once every two (2) years for purposes of selecting the Executive Board.
   c. For the purposes of voting on voluntary voting system guidelines referred to it

under Section 222 of HAVA, not less frequently than once every year.

2. Meetings shall be called by the DFO in consultation with the Executive Board.
3. The DFO shall approve the agenda for all meetings. The EAC shall distribute the agenda to Standards Board members prior to each meeting and shall publish notice of the meeting in the Federal Register as required by FACA.
4. Standards Board members and members of the public may submit agenda items to the DFO or Executive Board Chair.
5. Meetings.
    a. Open Meetings.
        i. Unless otherwise determined in advance, all Standards Board meetings will be open to the public.
        ii. Members of the public may attend any meeting or portion of a meeting that is not closed to the public and may, at the determination of the Chair, offer oral comment at such meeting. The Chair may decide in advance to exclude oral public comment during a meeting, in which case the meeting announcement published in the Federal Register will note that oral comment from the public is excluded. In such a case, the Standards Board will accept written comments as an alternative. In addition, members of the public may submit written statements to the EAC at any time.
        iii. All materials brought before, or presented to, the Board during the conduct of an open meeting, including, but not limited to, the minutes of the proceedings of the previous open meeting, will be available to the public for review or copying at the time of the scheduled meeting.
        iv. Minutes of open meetings shall be available to the public upon request.
        v. Once an open meeting has begun, it will not be closed unless prior approval of the closure has been obtained and proper notice of the closed session has been given to the public.
        vi. If, during the course of an open meeting, matters inappropriate for public disclosure arise during discussions, the Chair will order such discussion to cease and will schedule it for closed session.
    b. Closed Meetings.
        i. Notices of closed meetings will be published in the Federal Register at least 15 calendar days in advance.
        ii. Standards Board meetings will be closed only in limited circumstances and in accordance with applicable law. The Standards Board must obtain prior approval to conduct a closed session. Requests for closed meetings must be submitted to EAC's Office of General Counsel a minimum of 45 days in advance of the proposed closed session.
        iii. Where the DFO, in conjunction with the Office of General Counsel, has determined in advance that discussions during a Standards Board meeting will involve matters about which public disclosure would be harmful to the interests of the government, industry, or others, an advance notice of a closed meeting, citing the applicable exemptions of the Government in the Sunshine Act (GISA), shall be published in the Federal Register. The notice may announce the closing of all or just part

of a meeting.

iv. Minutes of closed meetings shall be available to the public upon request, subject to the Freedom of Information Act (FOIA).

6. Minutes.
   a. The DFO, or his or her designee, shall assure that detailed minutes of each minute are prepared and distributed to Standards Board members.
   b. Meeting minutes shall include the following: (1) Time, (2) date, (3) location, (4) record of persons present, including the names of Standards Board members, staff, and the names of members of the public making written or oral presentations, (5) a complete and accurate description of the matters discussed and conclusions reached, and (6) copies of all reports received, issued, or approved by the Standards Board.
   c. All documents, reports, or other materials prepared by or for the Standards Board constitute official government records and will housed at the EAC and maintained according to the Federal Records Act.
   d. Meeting minutes are considered part of the official government record.

Article VIII. Quorum and Proxy Voting

1. Quorum:
   a. A quorum shall be established when fifty percent (50%) plus one of Standards Board members is present for a meeting or are present by proxy.
   b. Proxy designations may be submitted in writing to the Chair up to the day of the Standards Board meeting.
2. Proxy Votes.
   a. Proxy votes may only be cast by Standards Board members, provided proxy designations have been timely filed in advance with the Chair clearly identifying the Standards Board member to cast an absent member's proxy vote.
   b. The Chair shall appoint a proxy committee to verify the eligibility of proxy votes.
3. Voting Generally.
   a. The Standards Board shall agree to actions by majority vote of those present and voting unless otherwise specified by these bylaws.
   b. Votes by the Standard Board on recommendations to EAC shall have the ayes, nays, and abstentions recorded.

Article IX. Committees

In appointing members to committees, the Standards Board shall pay particular attention to ensuring diverse membership. Accordingly, the Executive Board shall do due diligence to ensure that committee members (1) affiliate with diverse parties, (2) are representative of both state and local election officials, (3) represent different states and territories, and (4) representative of both elected and appointed officials.

1. Meetings.
   a. All committees may meet informally at any time for the purpose of conducting

their business, including telephonically or through electronic media.

2. Standing Committees.
    a. Nominating Committee. The Nominating Committee shall:
        i. Be comprised of five (5) members.
        ii. Solicit nominations for the Executive Board from Standards Board members.
        iii. Prepare and distribute to Standards Board members ballots that include all the information listed in Article V, section 1, subsection c, paragraph ii of these Bylaws.
    b. Bylaws Committee. The Bylaws Committee shall:
        i. Be comprised of seven (7) members.
        ii. Submit a report with all recommended amendments to the Executive Board for a seven (7) day comment period before submitting recommendations to the Standards Board for resolution and adoption.
3. Ad-Hoc Committees.
    a. The Standards Board may, at any time, by majority vote, establish an ad-hoc committee.
    b. The Standards Board member wishing to establish an ad-hoc committee must present to the Standards Board the reason(s) he/she is requesting the committee.
    c. Once an ad-hoc committee has been established, the Executive Board shall appoint members to the ad-hoc committee.

Article X. Amendments

1. The Standards Board's Bylaws Committee shall promulgate a form for proposing an amendment to the Standards Board's Bylaws.
    a. The form shall require the specific language of the proposed amendment to be included, identify the author of the amendment, and be designed to elicit the rationale and impact of the proposed amendment.
2. All proposed bylaw changes must be submitted in writing to the DFO:
    a. No later than December 1; or
    b. Within the seventy (70) day timeframe provided by the Executive Committee.
3. After receiving proposed bylaw changes, the DFO shall forward the proposed changes to the Standards Board Bylaws Committee and the EAC's General Counsel.
    c. The General Counsel shall report in an expeditious manner to the Bylaws Committee and the Executive Board whether or not a proposed change to the Bylaws is consistent with federal law and/or rules.
    d. The Bylaws Committee shall transmit a report containing the proposed bylaws to the Executive Board.
    e. The Standards Board's Executive Committee shall place the report on the proposed change to the Standards Board's Bylaws on the agenda for the next meeting of the Standards Board.
3. The Executive Board shall forward all proposed changes to Standards Board members at least thirty (30) days prior to the next meeting of the Standards Board via email and U.S. Mail to the applicable address of record on file with the EAC. The Executive Board shall request that EAC post the proposed change to the bylaws and all

supporting material on EAC's website at least thirty (30) days prior to the next meeting of the Standards Board.

4. The bylaws may be amended by on a two-thirds (2/3) vote of the members present and voting at any Standards Board meeting.

Article XI. Expenses and Reimbursement.

1. Expenses related to Standards Board operations will be borne by the EAC.
2. Expenditures of any kind must be approved in advance by the DFO.
3. Standards Board members shall not receive any compensation for their services, but shall be paid travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of federal agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in performance of their services for the Standards Board.

Article XII. Roberts Rules

1. The rules contained in the current edition of ***Robert's Rules of Order Newly Revised*** shall govern the Standards Board in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the Standards Board may adopt.
2. Voting procedures for the Standards Board, the Executive Board, and the subcommittees shall follow the accepted procedure, in the latest edition of Robert's Rules of Order.

Article XIII. Effective Date

1. These By-Laws are effective upon adoption by the Standards Board.

Article XIV. Transition Procedures and Ratification

1. The adoption of the bylaws has no effect on the selection, terms or appointment of the officers or members of the Standards Board, the Executive Board, or a committee of the Board serving on the effective date of these bylaws.
2. All acts of the Standards Board, the Executive Board, or a committee of the Board are hereby ratified, except to the extent that an act does not conform with a resolution adopted by the Standards Board before the effective date of these bylaws.

_____ _____

Chair Date

_____ _____

DFO Date

These bylaws were last updated on _____, 20__, and supersede all previous versions.

101606

7-19-06 Standards Board By-Laws

- Review FACA
- Standard Clauses - meeting minutes
- Standing Committees not described
  - Authority to Executive Board for ad hoc committees
    - SB can appoint
    - Chair can appt. chair of ad hoc
  - Intent was that Standards Committee could agree to ad hoc + exec could appoint members
- Bylaws committee by August 4th

~~A~~ By middle of August, recommended bylaws for discussion

- Strikethroughs
- Recommended paragraphs
- final version

- Alternative meetings for Board - look @ FACA
  - bylaws

Comm
- nominating
- VSG
- ad hoc

IN Committee section → talk re: process for adding ad hoc committee

Article V
Section 1
Sub-
Paragraph

027512

DRIOTR
TR TORRD

SOS
Mjohnson@sos.idaho.gov

Standards Board Clauses

- Standing Committees Marilyn
- Re-arrange Membership section
- Amendments
- Meeting Procedures - rework

8-15-06

- Send bylaws to Bartholomew before full meeting
- Jeannie - capture info from meeting system - check w/ Humanitas
- Executive Board referred to as members first elected → how long off before back on. 3 off 2/07, 3 off 2/09, 3 off 2/11.
- Head of Board be ex-officio of every committee
- minutes @ EAC, not elsewhere

Exec. ~~24~~ 48-hour period

Resolutions go to Board for Comment, but Committees present resolutions to full Standards Board

UNIVERSITY *of* PENNSYLVANIA

Fels Institute of Government
Founded in 1937 by Samuel S. Fels

3814 Walnut Street
Philadelphia, PA 19104-6197
215-898-8216
Fax: 215-898-1202

Stand Board Bylaws

- ~~When members first elected to Exec Board~~ When eligible for re-election?
- Exec Board ~~Pres~~ Chair ex officio to all committees
- EB records kept at ~~Penn~~ EAC.

Penn
Arts & Sciences

BYLAWS

OF THE UNITED STATES ELECTION ASSISTANCE COMMISSION

STANDARDS BOARD

The Standards Board embodies the vision of Congress to forge a partnership among federal, state and local election officials whose goal is to promote public confidence in the conduct of federal elections in the United States.

Section I: Purpose

The purpose of the Standards Board is to review the Voluntary Voting System Guidelines and the Best Practices For Voting Processes in Federal Elections, to submit its recommendations to the U.S. Election Assistance Commission (EAC), and to provide guidance and advice to EAC on a variety of topics related to the administration of elections for federal office.

lot purpose-duties

As deemed necessary, the Standards Board may convene hearings or subcommittees to support the Board's functions. The Board and its subcommittees shall function solely as an advisory body and must comply with the Federal Advisory Committee Act (FACA).

Section II: Authority

The Standards Board is a committee authorized and required by the Help America Vote Act of 2002 as such statute may be amended from time to time (HAVA). The Standards Board is subject to FACA, as outlined in its Charter and filed with the Congress on June 14, 2004; HAVA; and all other applicable Federal laws.

Section III: Membership of the Standards Board

A. Membership of the Standards Board shall be governed by Section 213 of HAVA.

B. The chief state election official of each state shall notify the Executive Board of the Standards Board and the EAC promptly of any vacancy or change of membership of the state's representatives to the Standards Board.

C. Two nonpartisan members from the same state shall not be deemed to be members of the same party as such term is used in Section 213(a)(3) of HAVA.

D. Duties of the members of the Standards Board shall be governed by HAVA.

Section IV: Executive Board —oRole of Board Officials

A. There shall be an Executive Board of the Standards Board that may act on behalf of the Standards Board between meetings of the Standards Board.

B. Membership of the Executive Board shall be governed by Section 213(c) of HAVA.

C. Nominations to the Executive Board shall be made in the following manner:

The Nominating Committee shall solicit nominations to the Executive Board from the membership. The solicitation shall be sent no later than December 1 before the expiration of an Executive Board member's term. Standards Board members may nominate themselves or other Standards Board members by responding to this solicitation.

Nominations shall be submitted to the DFO and shall be received no later than January 15. Nominations shall be in writing and may be submitted electronically. The solicitation shall designate the address and form for submitting nominations.

The Nominating Committee shall prepare a ballot to be distributed at the Standards Board meeting immediately following the submission deadline. The ballot shall be designed to enable the membership to select candidates based on considerations of party membership, state/local election official, geography, elected/appointed and in the case of state election officials, Secretary of State/Citizen Board. The Nominating Committee shall include a short biography of the candidates along with a description of the factors considered in designing the ballot.

For nominations for the first election following the adoption of these By-Laws (2007) there shall be two (2) positions for local election officials. For nominations for the second election following adoption of the By-Laws (2008) there shall be two (2) positions for state election officials. The number of state/local nominations shall continue to alternate in subsequent elections.

D. Elections to the Executive Board shall be governed by Section 213(c) of HAVA and shall be made at a meeting of the Standards Board.

E. Within 30 days of election of the Executive Board, the Executive Board members shall convene for the purposes of electing a Chair, Vice-Chair, and a Secretary. The term of the Chair, Vice-Chair, and Secretary shall be for one year. A member may not serve two consecutive terms for the

same office, *except in the case of a member serving the unexpired term of an office then the member may be elected to the same office for the succeeding term.*

F. The duties of the Chair shall include:

1. To preside at all meetings of the Executive Board.

2. To preside at all meetings of the Standards Board.

3. To appoint the chair of standing committees and any ad hoc committees of the Standards Board. The current standing committees are the Nominating Committee which shall be comprised of five (5) members and the By-Laws Committee which shall be comprised of seven (7) members.

4. To establish the agenda for meetings of the Executive Board in consultation with the EAC.

5. To establish the agenda for meetings of the Standards Board in consultation with the EAC.

6. To call meetings of the Executive Board in consultation with the EAC.

7. To call meetings of the Standards Board in consultation with the EAC.

G. The duties of the Vice-Chair shall be:

1. To preside at meetings of the Executive Board or perform other duties as may be appropriate in the absence of the Chair.

2. To preside at meetings of the Standards Board in the absence of the Chair.

3. To assist the Chair from time to time as the Chair may designate.

4. The Vice-Chair serves as the Chair-elect and serves as Chair for the unexpired term of the Chair if a vacancy occurs.

H. The duties of the Secretary shall include:

1. To maintain minutes at meetings of the Executive Board with the assistance of the DFO.

2. To maintain the record of the minutes of the Executive Board meetings.

3. To assist the Chair at meetings.

4. To assist the Chair from time to time as the Chair may designate.

I. The duties of the Executive Board shall include:

1. To establish and appoint the membership of appropriate standing committees and ad hoc committees of the Standards Board by soliciting interest from the Standards Board membership.

2. To meet as necessary to address issues of concern to the Standards Board between meetings of the Standards Board.

3. To approve the minutes of the Executive Board meetings.

4. To convene meetings of the Executive Board, including but not limited to, meetings by so-called conference calls utilizing such technology that allows each member to hear the comments of other members and to have their comments heard by other members.

5. To consult with the DFO to ensure compliance with federal statutes or other standards.

6. To attend meetings of the Executive Board, or to participate in meetings of the Executive Board when utilizing so called conference call technology, as called by the Chair or pursuant to subparagraph (8) of this subsection. Failure to attend or participate in 25% of the meetings of the Executive Board within the preceding 12 month period shall cause a vacancy on the Executive Board held by such member.

7. To perform all duties as required under HAVA.

8. Two members of the Executive Board shall have authority to call a meeting of the Executive Board in writing by filing the original call of the meeting with the Standards Board's Designated Federal Officer (DFO) and the purpose of the meeting shall be stated therein.

9. A majority of the members of the Executive Board shall be present for a quorum.

10. Actions of the Executive Board shall be made by majority vote of the full membership of the Executive Board. Proxy voting will not be allowed in Executive Board meetings. A representative of an Executive Board member many attend and participate in any and all discussions but may not vote.

11. A member of the Executive Board may be removed from the Executive Board by two-thirds vote of the Standards Board at a meeting of the Standards Board.

12. In the event of a vacancy in the Executive Board the remaining members of the Executive Board may appoint an interim member of the Executive Board until the next meeting of the Standards Board.

13. The Executive Board shall promptly provide to the members of the Standards Board all guidelines proposed to be adopted pursuant to Section 222(b)(3) of HAVA.

14. The recommendations made by the Executive Board to the Standards Board pursuant to Section 222(b)(3) shall include an appendix of any and all dissenting comments received from Executive Board members.

15. Such other duties as may be delegated to the Executive Board by the Standards Board from time to time.

J. The duties of the DFO shall be:

1. To serve as the government's agent for all matters related to the Standards Board's activities.

2. To approve or call the meeting of the Standards Board.

3. To approve agendas proposed by the Executive Committee of the Standards Board.

4. To attend all meetings of the Standards Board and Executive Board of the Standards Board.

5. To adjourn the meetings when such adjournment is in the public interest.

6. To provide adequate staff support to the Standards Board, including the performance of the following functions:

   a. Notifying members of the time and place for each meeting.

   b. Maintaining records of all meetings, including subgroup or working group activities, as required by law.

   c. Maintaining the roll.

of Information Act (FOIA). The minutes will include the following: the time, date and place of the Standards Board meeting; a record of the persons present (including the names of Standards Board members, names of staff, and the names of members of the public from whom written or oral presentations were made); a complete and accurate description of the matters discussed and conclusions reached; and copies of all reports received, issued or approved by the Board.

All documents, reports, or other materials prepared by, or for, the Standards Board constitute official government records and will be maintained according to the Federal Records Act.

F. Unless otherwise determined in advance, all meetings of the Standards Board will be open to the public. Once an open meeting has begun, it will not be closed unless prior approval of the closure has been obtained and proper notice of the closed session has been given to the public. All materials brought before, or presented to, the Board during the conduct of an open meeting, including the minutes of the proceedings of the previous open meeting, will be available to the public for review or copying at the time of the scheduled meeting.

Members of the public may attend any meeting or portion of a meeting that is not closed to the public and may, at the determination of the Chair, offer oral comment at such meeting. The Chair may decide in advance to exclude oral public comment during a meeting, in which case the meeting announcement published in the Federal Register will note that oral comment from the public is excluded and will invite written comment as an alternative. Members of the public may submit written statements to the EAC at any time.

G. Meetings of the Standards Board will be closed only in limited circumstances and in accordance with applicable law. The Standards Board must obtain prior approval to conduct a closed session. Requests for closed meetings must be submitted to EAC's Office of General Counsel 45 days in advance of the proposed closed session.

Where the DFO, in conjunction with the Office of General Counsel, has determined in advance that discussions during a Standards Board meeting will involve matters about which public disclosure would be harmful to the interests of the government, industry, or others, an advance notice of a closed meeting, citing the applicable exemptions of the Government in the Sunshine Act (GISA), will be published in the Federal Register. The notice may announce the closing of all or just part of a meeting. If, during the course of an open meeting, matters inappropriate for public disclosure arise during discussions, the Chair will order such discussion to cease and will schedule it for closed session. Notices of closed meetings will be published in the Federal Register at least 15 calendar days in advance.

Section VI: Voting

A. Actions taken by the Standards Board shall be by majority vote of those present and voting unless otherwise specified in these bylaws.

B. 1. Proxy designations must be submitted in writing to the Chair up to the day of the meeting of the Standards Board.

2. Proxy votes may be cast by members of the Standards Board or other designee provided the proxy designations have been timely filed in advance with the Chair clearly identifying the Board member or other designee to cast his proxy vote.

3. The Chair shall appoint a proxy committee to verify eligibility of proxy votes.

C. Voting procedures for the Standards Board, the Executive Board, and the subcommittees will follow the accepted procedure in the latest edition of Robert's Rules of Order. Votes by the Standard Board on recommendations to EAC shall have the ayes, nays, and abstentions recorded.

Section VII: Bylaws — why here?

A. General

1. The general membership of the EAC's Standards Board shall have the exclusive right to repeal and/or amend the organization's bylaws.

2. The bylaws may be amended by a two-thirds vote of the members present and voting at any Standards Board meeting , for which legal notice has been given to the Standards Board, where a quorum is present, and when at least 30 days prior notice of the vote has been given to the Standards Board members.

B. Procedures

1. The Standards Board's Bylaws Committee shall promulgate a form for proposing an amendment to the Standards Board's Bylaws. The form shall require the specific language of the proposed amendment to be included, shall identify the author of the amendment, and shall be designed to elicit the rationale and impact statement.

2. Proposed changes to the Standards Board's bylaws submitted fewer than 60 days prior to a scheduled meeting of the Standards Board shall be deferred until the meeting following that meeting of the Standards Board.

3. Proposed changes to the Standards Board's Bylaws shall be submitted to the Standards Board's Designated Federal Officer who shall then expeditiously forward the proposed changes to the Standard's Board's Bylaws Committee and to the EAC's General Counsel.

4. The General Counsel shall report in an expeditious manner to the Bylaws Committee and the Executive Board whether or not a proposed change to the Bylaws is consistent with federal law and/or rules.

5. The Standards Board's Bylaws Committee shall prepare and forward to the Standards Board's Executive Committee the General Counsel's report on the legality of the proposed change, an analysis of the impact of a proposed change and a recommendation for disposition at least 45 days prior to the next Standards Board meeting.

6. The Standards Board's Executive Committee shall place the report on the proposed change to the Standards Board's Bylaws on the agenda for the meeting of the Standards Board.

7. The Standards Board's Executive Board shall forward all proposed changes along with rationale for or against the proposed change to all Standards Board members at least 35 days prior to the next meeting of the Standards Board via email and U.S. Mail to the applicable address of record on file with the EAC. The Executive Board shall request EAC post the proposed change to the bylaws and all supporting material on EAC's website at least 35 days prior to the next meeting of the Standards Board.

Section VIII: Expenses and Reimbursement

Expenses related to the operation of the Standards Board will be borne by the EAC. Expenditures of any kind must be approved in advance by the DFO.

Members of the Standards Board will not be compensated for their services but will receive reimbursement for travel expenses and subsistence. The EAC will pay travel and per diem for non-government members at a rate equivalent to that allowable for federal employees.

Section IX: Effective Date

These By-Laws are effective upon adoption by the Standards Board.

Section X: Transition Procedures and Ratification

A. The adoption of the By-Laws has no effect on the selection, terms or appointment of the officers or member of the Standards Board, the Executive Board, or a subcommittee of a Board serving on the effective date of these By-Laws.

B. All acts of the Standards Board, the Executive Board or a subcommittee of a Board are hereby ratified, except to the extent that an act does not conform with a resolution adopted by the Standards Board before the effective date of these By-Laws.

BYLAWS OF THE U.S. ELECTION ASSISTANCE COMMISSION-BOARD OF ADVISORS

Article I: Board of Advisors, Operating Authority

1. Pursuant to the Federal Advisory Committee Act and the Help America Vote Act of 2002 (HAVA) [Public Law 107-252], the Board of Advisors has been granted its authority through its Charter with the U.S. Election Assistance Commission and will hereinafter be referred to as 'The Board'.

Article II: Objectives

1. Advise the EAC through review of the voluntary voting system guidelines described in Title II Part 3 of the HAVA; through review of the voluntary guidance described under Title III of HAVA; and through the review of the best practices recommendations contained in the report submitted under Section 242(b) of Title II (HAVA Title II section 212).
2. The Board will function solely as an advisory body and will comply fully with the provisions of the Federal Advisory Committee Act.(Exhibit A)

Article III: Membership

1. Pursuant to HAVA Title, Section 214 (a), the Board shall consist of the following:
   a. Two members appointed by the National Governors Association;
   b. Two members appointed by the National Conference of State Legislatures;
   c. Two members appointed by the National Association of Secretaries of State;
   d. Two members appointed by the National Association of State Election Directors;
   e. Two members appointed by the National Association of Counties;
   f. Two members appointed by the National Association of County Recorders, Election Officials, and Clerks;
   g. Two members appointed by the United States Conference of Mayors;
   h. Two members appointed by the Election Center;
   i. Two members appointed by the International Association of County Recorders, Election Officials, and Treasurers;
   j. Two members appointed by the United States Commission on Civil Rights;
   k. Two members appointed by the Architectural and Transportation Barrier Compliance Board under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792);
   l. The Chief of the Public Integrity Section of the Criminal Division of the Department of Justice, or the chief's designee;
   m. The Chief of the Voting Section of the Civil Rights Division of the Department of Justice, or the chief's designee;
   n. The Director of the Federal Voting Assistance Program of the Department of Defense;

o. Four members representing professionals in the field of science and technology, of whom
    i. One (1) each shall be appointed by the Speaker and the Minority Leader of the House of Representatives; and
    ii. One (1) each shall be appointed by the Majority Leader and the Minority Leader of the Senate.
p. Eight members representing voter interests, of whom-
    i. Four (4) members shall be appointed by the Committee on House Administration of the House of Representatives, of whom two (2) shall be appointed by the chair and two (2) shall be appointed by the ranking minority member; and
    ii. Four (4) members shall be appointed by the Committee on Rules and Administration of the Senate, of whom two (2) shall be appointed by the chair and two (2) shall be appointed by the ranking minority members.

Article IV: Terms of Service, Filling vacancies;

1. Members of the Board shall serve for a term of two (2) years and may be reappointed.
2. Vacancy appointments to the Board shall be made in the same manner as the original appointment pursuant to the HAVA.

Article V: Officers

1. The Board shall elect a Chair, Vice-Chair and Secretary from its members.
2. All votes for officers shall be by secret ballot.
3. Each position shall last a period of one year or until the next election for a specified office.
4. Officers may serve no more than two consecutive terms for a specific office.
5. The Chair shall appoint a Parliamentarian to oversee the conduct of the meeting.
6. The election of officers shall be held at the first meeting of each calendar year.

In Chair duties

Article VI: Duties of Officers

1. The Chair shall preside over meetings of the Board of Advisors; appoint all committees and serve as official liaison to the Election Assistance Commission for all resolutions and recommendations adopted by the Board; request information from any federal agencies necessary to assist with the functions of the Board of Advisors and coordinate with the Election Assistance Commission and Standards Board meeting calls pursuant to Section 222 of the HAVA; appoint committees as necessary to carry out advisory responsibilities charged under the HAVA or as otherwise assigned by the Election Assistance Commission; serve as *ex officio* member of all committees.
2. The Vice-Chair, in absence of the Chair, shall serve as official liaison to the Election Assistance Commission for all resolutions and

recommendations adopted by the Board and preside over meetings of the Board of Advisors;

3. The Secretary shall be responsible for notifying the Board of Advisors on meeting calls; pending matters of business for the Board of Advisors; and serve as the Chair of the By-laws Committee.

Article VII: Meetings

1. Pursuant to the HAVA, the Board of Advisors shall conduct no less than two meetings per calendar year subject to forty-five (45) days advance notice of the meeting and proposed actions.
2. Other meetings may be called at the request of the Chair, or at the written request of a majority of the Board of Advisors, as necessary, subject to forty-five (45) days advance notice, which notice may be waived by agreement of a majority of the members to the extent permitted by law.
3. All meetings shall be subject to requirements within the Federal Advisory Committee Act.
4. To the extent permitted by law, meetings may be held by electronic means such as conference calls.

Article VIII: Quorum and Proxy Voting

1. Quorum shall consist of present and voting members of the Board.
2. Proxy designations must be submitted in writing to the Chair up to the day of the meeting of the Board.
3. Proxy votes may only be cast by members of the Board provided the proxy designations have been timely filed in advance with the Chair clearly identifying the Board member to cast his proxy vote.
4. The Chair shall appoint a proxy committee to verify eligibility of proxy votes.

Article IX: Standing Committees

Section 1- Meetings

a. All committees may meet informally at anytime for the purpose of conducting their business, including telephonically or as otherwise determined necessary by the Committee Chair.

Section 2-Bylaws Committee

a. The Secretary shall serve as Chair of the Bylaws Committee.
b. The Bylaws Committee shall be comprised of no more than five (5) individuals, including the Secretary. Each remaining member of the committee will be appointed by the Board of Advisors by majority vote.
c. All bylaws and resolutions presented to the association shall be referred to the committee for consideration and reported to the meeting prior to adoption.

Section 3-Voting System Standards Committee

a. The Chair of the Voting System Standards Committee shall be appointed by the Chair of the Board of Advisors.

b. The Chair of the Voting System Standards Committee must be acquainted with the conduct of elections and incorporation of various election technology and/or ballot design.
c. The Committee shall be comprised of no more than eleven (11) individuals. (members)
d. At least one (1) member, excluding the Chair, shall represent a disability advocacy group on this committee.
e. One (1) member, excluding the Chair, shall represent each of the following:
    i. National Association of County Recorders, Election Officials and Clerks (NACRC);
    ii. International Association of Clerks, Recorders, Election Officials and Treasurers (IACREOT);
    iii. National Association of Secretaries of State (NASS);
    iv. National Association of State Election Directors (NASED);
    v. The Election Center;
f. The Chair shall appoint other members who are not specified in Section (e).

Article X: Amendments

a. The bylaws may be amended based on a 2/3 decision of the Board.
b. All proposed bylaw changes must be submitted to the Chair for subsequent reporting to the Bylaws committee no less than thirty (30) days prior to a meeting.
c. All proposed bylaw changes should be submitted in writing and distributed to all members of the Advisory Board one (1) month prior to a meeting.

Article XI: Parliamentary Authority

a. The parliamentary authority shall be Robert Rules of Order Newly Revised Edition.

1 of 16 DOCUMENTS

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 1

Check w/Gavin or Julie — Standard Board members can remove whether [redacted] for employment law question

§ 1. Short title

This Act may be cited as the "Federal Advisory Committee Act".

HISTORY:
(Oct. 6, 1972, P.L. 92-463, § 1, 86 Stat. 770.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Short titles:
Act Dec. 17, 1997, P.L. 105-153, § 1, 111 Stat. 2689, provides: "This Act may be cited as the 'Federal Advisory Committee Act Amendments of 1997'.". For full classification of such Act, consult USCS Tables volumes.

NOTES:
Research Guide:
Federal Procedure:
15 Fed Proc L Ed, Freedom of Information § 38:19.
26 Fed Proc L Ed, Patents § 60:758.

Annotations:
Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-15]. 160 ALR Fed 483.*

Law Review Articles:
Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*
Beatty. The FBA Responds to Problems Plaguing Implementation of the Federal Advisory Committee Act. *33 Fed B J 77,* February 1986.
Brown. Does National Anti-Hunger Coalition v Executive Committee of the President's Private Sector Survey on Cost Control Create Loop-Holes in the Advisory Committee System? *33 Fed B J 80,* February 1986.

Interpretive Notes and Decisions:

Requirements of Federal Advisory Committee Act *(5 USCS Appx §§ 1* et seq.) cannot be constitutionally applied to American Bar Association committee that advises President and Department of Justice on federal judicial nominations

because President alone nominates candidates for federal judgeships, role of Congress is limited to Senate's advise and consent function, purposes of requirements are served through public confirmation process, and any need for applying requirements to committee is outweighed by President's interest in preserving confidentiality and freedom of consultation in selecting nominees. *Washington Legal Foundation v United States Dep't of Justice (1988, DC Dist Col) 691 F Supp 483,* affd *(1989) 491 US 440, 105 L Ed 2d 377, 109 S Ct 2558* (criticized in *In re Richardson (1998, BC MD La) 217 BR 479, 32 BCD 114)* and (criticized in *Manshardt v Fed. Judicial Qualifications Comm. (2005, CA9 Cal) 401 F3d 1014).*

2 of 16 DOCUMENTS

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 2

§ 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

HISTORY:
(Oct. 6, 1972, P.L. 92-463, § 2, 86 Stat. 770.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Ex. Or. No. 11686 superseded. Ex. Or. No. 11686 of Oct. 7, 1972, *37 Fed. Reg. 21421,* formerly classified as a note under this section, which related to committee management, was superseded by Ex. Or. No. 11769 of Feb. 21, 1974, *39 Fed. Reg. 7125,* formerly set out as a note under this section.

Ex. Or. No. 11769 of Feb. 21, 1974 revoked. Ex. Or. No. 11769 of Feb. 21, 1974, *39 Fed. Reg. 7125,* formerly classified as a note to this section, was revoked by Ex. Or. No. 12024 of Dec. 1, 1977, *42 Fed. Reg. 61445,* set out as a note to this section.

Transfer of certain advisory committee functions. Ex. Or. No. 12024 of Dec. 1, 1977, *42 Fed. Reg. 61445,* provided: "By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the Federal Advisory Committee Act, as amended [5 USCS Appx], *Section 301 of Title 3 of the United States Code, Section* 202 of the Budget and Accounting Procedures Act of 1950 (*31 U.S.C. 581c*) [*31 USCS § 1531*], and Section 7 of Reorganization Plan No. 1 of 1977 *[42 Fed. Reg. 56101* (October 21, 1977), *5 USCS § 903* note], and as President of the United States of America, in accord with the transfer of advisory committee functions from the Office of Management and Budget to the General Services Administration provided by Reorganization Plan No. 1 of 1977, it is hereby ordered as follows:

"Section 1. The transfer, provided by Section 5F of Reorganization Plan No. 1 of 1977 *(42 FR 56101)* [*5 USCS § 903* note, and note preceding *3 USCS § 101*], of certain functions under the Federal Advisory Committee Act, as amended (5 U.S.C. App. I) [5 USCS Appx.], from the Office of Management and Budget and its Director to the Administrator of General Services is hereby effective.

"Sec. 2. There is hereby delegated to the Administrator of General Services all the functions vested in the President by the Federal Advisory Committee Act, as amended [5 USCS Appx], except that, the annual report to the Congress required by Section 6(c) of that Act [5 USCS Appx] shall be prepared by the Administrator for the President's consideration and transmittal to the Congress.

"Sec. 3. The Director of the Office of Management and Budget shall take all actions necessary or appropriate to effectuate the transfer of functions provided in this Order [this note], including the transfer of funds, personnel and positions, assets, liabilities, contracts, property, records, and other items related to the functions transferred.

"Sec. 4. Executive Order No. 11769 of February 21, 1974 [formerly set out as a note to this section] is hereby revoked.

"Sec. 5. Any rules, regulations, orders, directives, circulars, or other actions taken pursuant to the functions transferred or reassigned as provided in this Order [this note] from the Office of Management and Budget to the Administrator of General Services, shall remain in effect as if issued by the Administrator until amended, modified, or revoked.

"Sec. 6. This Order [this note] shall be effective November 20, 1977.".

NOTES:

Research Guide:

Federal Procedure:

15 Fed Proc L Ed, Freedom of Information § 38:19.

Am Jur:

60 Am Jur 2d, Patents § 755.

Annotations:

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-15].* *160 ALR Fed 483.*

Law Review Articles:

Tuerkheimer. Veto by Neglect: The Federal Advisory Committee Act. *25 Am U L Rev 53, 1975.*

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

Perritt; Wilkinson. Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years. *63 Geo LJ 725, 1975.*

The Federal Advisory Committee Act. *10 Harv J Legis 217, 1973.*

O'Reilly. Advisers and Secrets: The Role of Agency Confidentiality in the Federal Advisory Committee Act. *13 N Ky L Rev 27, 1986.*

Interpretive Notes and Decisions:

In suit alleging that task force, which included Vice President and government officials and gave policy recommendations to President, failed to comply with Federal Advisory Committee Act, where district court entered broad discovery orders against Vice President and government officials, appellate court prematurely terminated its writ of mandamus inquiry after Vice President refused to assert executive privilege; appellate court labored under mistaken assumption that assertion of executive privilege was necessary precondition to petitioners' separation-of-powers objections. *Cheney v United States Dist. Court (2004, US) 159 L Ed 2d 459, 124 S Ct 2576, 32 Media L R 2121, 17 FLW Fed S 447.*

Where U.S. Supreme Court Justice attended duck-hunting trip with Vice President of United States, who was defendant in official-capacity suit before Court, Justice's recusal was not required or permitted, because, inter alia, case was run-of-the-mill legal dispute about administrative decision under Federal Advisory Committee Act, *5 USCS app. 1,* § 1 et seq. *Cheney v United States Dist. Court (2004) 541 US 913, 158 L Ed 2d 225, 124 S Ct 1391.*

Working groups formed during post-judgment conference process concerning protection of endangered Snake River salmon were not advisory committees within meaning of FACA since they were not established by agency of federal government, rather were created by principals in preceding litigation, nor were they funded by or subject to management of federal government. *ALCOA v National Marine Fisheries Serv. (1996, CA9 Or) 92 F3d 902, 96 CDOS 5952, 96* Daily Journal DAR 9735.

Alleged inadequate public notice at several steps in protracted approval process for siting new memorial was harmless since position of organization challenging procedure was main focus of each stage in approval process, was considered and simply did not prevail; notably, organization did not become involved in siting process despite numerous instances of adequate notice. *Friends of Iwo Jima v National Capital Planning Comm'n (1999, CA4 Va) 176 F3d 768.*

Advisory committee exists to advise and not to decide. *Metcalf v National Petroleum Council (1977, App DC) 180 US App DC 31, 553 F2d 176, 7 ELR 20218.*

Letter by Attorney General's Commission on Pornography to magazine publisher asking for response to accusation that its magazine was pornographic was not unlawful since, notwithstanding any misapprehension of publisher, court did believe that Commission ever threatened to use state's coercive power against publisher. *Penthouse Int'l, Ltd. v Meese (1991, App DC) 291 US App DC 183, 939 F2d 1011,* cert den *(1992) 503 US 950, 117 L Ed 2d 650, 112 S Ct 1513.*

National Academy of Sciences committee which produced scientific manual which included guidelines for handling and monitoring treatment of laboratory animals was "utilized" within meaning of statute since Department of Health and Human Services relied on its work product and because it was formed by National Academy of Sciences, which is quasi-public entity. *Animal Legal Defense Fund v Shalala (1997, App DC) 322 US App DC 381, 104 F3d 424, 160 ALR Fed 777,* reh, en banc, den (1997, App DC) *325 US App DC 1, 114 F3d 1209* and reh den (1997, App DC) *1997 US App LEXIS 21156* and cert den *(1997) 522 US 949, 139 L Ed 2d 285, 118 S Ct 367.*

Even if Federal Advisory Committee Act's requirements that agency representative approve agenda of advisory committee meeting as well as § 2's hortatory language that all matters under advisory committee's consideration should be determined by official, agency, or officer forbid advisory committee from taking any action not approved by agency representative and not included in committee's agenda, it does not mean that agency administrator or representative had duty to intervene to prevent committee from voting on resolution not on agenda. *Claybrook v Slater (1997, App DC) 324 US App DC 145, 111 F3d 904* (criticized in *Taylor v FDIC (1997, App DC) 328 US App DC 52, 132 F3d 753).*

District court's injunction against agency's use of or reliance on report prepared by committee organized and operated in violation of FACA probably did not redress any of appellees' claimed injuries, and district court should have afforded appellees opportunity to take discovery and refine their request for equitable relief. *Natural Resources Defense Council v Pena (1998, App DC) 331 US App DC 198, 147 F3d 1012,* on remand, motion to strike den (1999, DC Dist Col) *189 FRD 4.*

In suit where Vice President, and others, all defendants under Federal Advisory Committee Act suit, petitioned for writ of mandamus vacating district court's discovery orders, directing court to rule on basis of administrative record,

petitioners failed to satisfy heavy burden required to justify extraordinary remedy of mandamus as their challenges to district court's legal rulings could be fully considered on appeal following final judgment, and their claims of harm could be fully cured in district court; narrow, carefully focused discovery would fully protect Vice President; either Vice President would have no need to claim privilege, or if he did, then district court's express willingness to entertain privilege claims and to review allegedly privileged documents in camera would prevent any harm; moreover, such measures would enable district court to resolve statutory question—whether Federal Advisory Committee Act (FACA), *5 USCS App. 2,* applied to energy policy commission at issue—without sweeping intrusions into *Presidency and Vice Presidency. In re Cheney (2003, App DC) 357 US App DC 274, 334 F3d 1096,* reh, en banc, den (2003, App DC) *2003 US App LEXIS 18831* and reh den (2003, App DC) *2003 US App LEXIS 18832* and vacated, remanded (2004, US) *159 L Ed 2d 459, 124 S Ct 2576, 32 Media L R 2121, 17 FLW Fed S 447* and (ovrld as stated in *Halmon v Jones Lang Wootton USA (2005, DC Dist Col) 355 F Supp 2d 239).*

Federal Advisory Committee Act was aimed at eliminating useless advisory committees, strengthening independence of remaining advisory committees, and preventing advisory groups from becoming self-serving. *Consumers Union of United States, Inc. v HEW (1976, DC Dist Col) 409 F Supp 473,* affd without op (1977, App DC) *179 US App DC 280, 551 F2d 466.*

Contention that advisory boards established by Taylor Grazing Act [*43 USCS §§ 315* et seq.] were exempt from effect of Federal Advisory Act was without merit; in choosing to terminate all advisory committees, Congress contemplated that FAA would affect existing substantive law and that if it was later decided that a particular advisory committee was necessary, Congress would enact legislation to recharter it. *Carpenter v Morton (1976, DC Nev) 424 F Supp 603.*

Industry representatives did not constitute federal advisory committee within meaning of *5 USCS Appx § 2*(2), where group of cement industry representatives who submitted proposal to Environmental Protection Agency for enforcement agreement regarding cement kiln dust was not established at request of EPA, group had no fixed membership or organized structure, and although EPA had logistical control over group, this was not substantive control amounting to utilization of group. *Huron Envtl. Activist League v United States EPA (1996, DC Dist Col) 917 F Supp 34, 26 ELR 21085.*

Animal rights organization is not granted preliminary injunction to enjoin members of U.S. delegation from participating, without complying with *5 USCS Appx §§ 1*-14, in working group of experts whose objective is to develop international humane animal trapping standards, where (1) majority of members of U.S. delegation were selected by National Governors Association with no input from federal agencies, (2) only one federal official played substantive role, and where working group was formed at behest of international constituency, and (3) U.S. Trade Representative (USTR) at most indirectly facilitated formation of group, because plaintiff has not demonstrated substantial likelihood of success on merits of its claim that working group was established or utilized by USTR and is thereby subject to statute. *People for the Ethical Treatment of Animals v Barshefsky (1996, DC Dist Col) 925 F Supp 844.*

Private organization representing chemical producers did not have standing to challenge composition of National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances as violative of "fair balance" requirement of *5 USCS Appx § 2,* given that committee had made no final decisions on any acute exposure guideline levels and that there was no reason to believe that committee would do anything differently with one or 2 more industry representatives serving on it. *Fertilizer Inst. v United States EPA (1996, DC Dist Col) 938 F Supp 52, 43 Envt Rep Cas 1385* (criticized in *Northwest Ecosystem Alliance v Office of the United States Trade Representative (1999, WD Wash) 1999 US Dist LEXIS 21689).*

MSPB lacked jurisdiction of employee's IRA appeal since his employer, Defense Intelligence Agency, is not covered agency, but rather is specifically excluded from coverage of whistleblower protection provisions. *Van Werry v Merit Sys. Protection Bd. (1993, CA) 995 F2d 1048.*

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 3

§ 3. Definitions.

For the purpose of this Act—

(1) The term "Director" ["Administrator"] means the Director of the Office of Management and Budget [Administrator of General Services].

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

(3) The term "agency" has the same meaning as in *section 551(1) of title 5, United States Code.*

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

HISTORY:

(Oct. 6, 1972, P.L. 92-463, § 3, 86 Stat. 770; Dec. 17, 1997, P.L. 105-153, § 2(a), 111 Stat. 2689.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed words "Administrator" and "Administrator of General Services" have been inserted in para. (1) of this section on the authority of Reorg. Plan No. 1 of 1977, § 5F, *42 Fed. Reg. 56101,* 91 Stat. 1634, which appears as *5 USCS § 903* note, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Or. No. 12024 of Dec. 1, 1977, *42 Fed. Reg. 61445,* which appears as a note to § 2 of this Act.

Amendments:

1997. Act Dec. 17, 1997, in para. (2), in the concluding matter, substituted "such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration." for "such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.".

Other provisions:

Effective date and application of Dec. 17, 1997 amendments. Act Dec. 17, 1997, P.L. 105-153, § 2(c), 111 Stat. 2691, provides:

"(1) In general. Except as provided in paragraph (2), this section and the amendments made by this section [redesignating § 15 of the Federal Advisory Committee Act as § 16, and adding a new § 15] shall take effect on the date of the enactment of this Act.

"(2) Retroactive effect. Subsection (a) and the amendments made by subsection (a) [amending this section] shall be effective as of October 6, 1972, except that they shall not apply with respect to or otherwise affect any particular advice or recommendations that are subject to any judicial action filed before the date of the enactment of this Act.".

NOTES:

Related Statutes & Rules:

This section is referred to in *3 USCS § 411*; *10 USCS § 1783*; *12 USCS § 1441a*.

Research Guide:

Federal Procedure:

15 Fed Proc L Ed, Freedom of Information §§ 38:19.

Am Jur:

37A Am Jur 2d, Freedom of Information Acts § 34.

77 Am Jur 2d, United States § 29.

Annotations:

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-15]*. *160 ALR Fed 483.*

Law Review Articles:

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

Interpretive Notes and Decisions:

1. Advisory committees 2. Standing to challenge committee actions 3. Status of particular bodies as advisory committees

1. Advisory committees

Although National Petroleum Council had operated for considerable period of time prior to effective date of Federal Advisory Committee Act, it is clear that Council is advisory committee within meaning of § 3 of FACA and thus subject to Act's provisions. *Metcalf v National Petroleum Council (1977, App DC) 180 US App DC 31, 553 F2d 176, 7 ELR 20218.*

When federal administrator establishes or utilizes advisory committee, he must comply with provisions of Federal Advisory Committee Act; it makes no difference whether committee is his own creation or pre-existing group and there is nothing in regulatory scheme of Act to suggest that Congress intended to exclude organizations fitting definition of advisory committee from coverage simply because they had existence independent of agency utilizing them. *Center for Auto Safety v Cox (1978, App DC) 188 US App DC 426, 580 F2d 689.*

Federal Advisory Committee Act was not intended to apply to all amorphous, ad hoc group meetings; only those groups having some sort of established structure and defined purpose may be considered as "advisory committees" within meaning of Act. *Nader v Baroody (1975, DC Dist Col) 396 F Supp 1231.*

National Academy of Sciences is not agency for purposes of Federal Advisory Committee Act in absence of any significant delegation of governmental authority, jurisdiction, administrative function or power; nor was Academy's Committee on Motor Vehicle Emissions "advisory committee" under FACA where legislative history of that Act evidences apparent intention on part of Congress to exclude from coverage groups providing advice to federal agencies pursuant to

contractual relationship and specifically committees of National Academy of Sciences. *Lombardo v Handler (1975, DC Dist Col) 397 F Supp 792, 8 Envt Rep Cas 1084, 6 ELR 20046,* affd without op (1976, App DC) *178 US App DC 277, 546 F2d 1043,* cert den *(1977) 431 US 932, 53 L Ed 2d 248, 97 S Ct 2639.*

Legislative history of Federal Advisory Committee Act evidences apparent intention on part of Congress to exclude from coverage groups providing advice to federal agencies pursuant to contractual relationships. *Lombardo v Handler (1975, DC Dist Col) 397 F Supp 792, 8 Envt Rep Cas 1084, 6 ELR 20046,* affd without op (1976, App DC) *178 US App DC 277, 546 F2d 1043,* cert den *(1977) 431 US 932, 53 L Ed 2d 248, 97 S Ct 2639.*

Meetings held between FDA officials and representatives of Cosmetic, Toiletry and Fragrance Association were not "advisory committee meetings" within meaning of § 3(2) of FACA where, inter alia, CTFA was presenting to FDA a voluntary, industry-sponsored proposal and was seeking FDA's comments and advice, rather than FDA having solicited industry and consumer viewpoints on program proposed by FDA. *Consumers Union of United States, Inc. v HEW (1976, DC Dist Col) 409 F Supp 473,* affd without op (1977, App DC) *179 US App DC 280, 551 F2d 466.*

Federal Advisory Committee Act was intended to apply to committees created by agencies and to those committees not originally created by agencies but subsequently used by them as advisory committees; exclusion provided by § 3(2) of FACA was applicable to committees made up wholly of federal officials, and did not apply to committee consisting of both state and federal employees. *Center for Auto Safety v Tiemann (1976, DC Dist Col) 414 F Supp 215,* remanded (1978, App DC) *188 US App DC 426, 580 F2d 689.*

Requirements of Federal Advisory Committee Act *(5 USCS Appx §§ 1* et seq.) cannot be constitutionally applied to American Bar Association committee that advises President and Department of Justice on federal judicial nominations because President alone nominates candidates for federal judgeships, role of Congress is limited to Senate's advise and consent function, purposes of requirements are served through public confirmation process, and any need for applying requirements to committee is outweighed by President's interest in preserving confidentiality and freedom of consultation in selecting nominees. *Washington Legal Foundation v United States Dep't of Justice (1988, DC Dist Col) 691 F Supp 483,* affd *(1989) 491 US 440, 105 L Ed 2d 377, 109 S Ct 2558* (criticized in *In re Richardson (1998, BC MD La) 217 BR 479, 32 BCD 114)* and (criticized in *Manshardt v Fed. Judicial Qualifications Comm. (2005, CA9 Cal) 401 F3d 1014).*

Department of Energy's (DOE) establishment and use of three of four challenged committees contravened Federal Advisory Committee Act, 5 USCS Appx where court reasoned that committees were advisory in nature; committees did not have capability of acting on their own and, rather, provided advice to *DOE. NRDC v Abraham (2002, DC Dist Col) 223 F Supp 2d 162,* set aside in part and remanded in part (2004, App DC) *359 US App DC 183, 353 F3d 40* and (ovrld in part as stated in *Int'l Brominated Solvents Ass'n v Am. Conf. of Governmental Indus. Hygienists, Inc. (2005, MD Ga) 21 BNA OSHC 1018).*

National Commission on Observance of International Women's Year (IWY) is not "advisory committee" subject to Federal Advisory Committee Act since there is nothing in Ex. Or. No. 11832 or Public Law 94-167 which assigns Commission any advisory functions; while it may make its own recommendations in report on National Conference of Women it submits to Congress and President, Commission was not "established" or "utilized" for this purpose; National Women's Conference, to be organized by National Commission on IWY which will, among other functions, make findings and recommendations on various subjects to be submitted through Commission's report to President is advisory committee subject to Federal Advisory Committee Act; State and regional meetings, organized under Public Law 94-167, have sole statutory purpose of selecting representatives to Conference, and since they are not required to make recommendations to IWY Commission and others, they are not "advisory committees", nor are State coordinating committees "advisory" since they have only operational role of organizing and conducting State or regional meetings and are, in effect, grantees of National Commission. *(1977) 57 Comp Gen 51.*

2. Standing to challenge committee actions

Plaintiff has standing to bring claim under Federal Advisory Committee Act where it sustains injury in fact, injury could be remedied if court invalidated committee's decision, and where interest falls within zone of interest of Federal Advisory Committee Act. HLI Lordship Indus. v Committee for Purchase from *Blind & Other Severely Handicapped (1985, ED Va) 615 F Supp 970,* revd on other grounds, remanded (1986, CA4 Va) *791 F2d 1136.*

3. Status of particular bodies as advisory committees

American Bar Association's standing committee on federal judiciary, in its role of advising Justice Department

regarding potential nominees for federal judgeships, does not constitute advisory committee for purposes of FACA because literalistic reading of definition section would bring such advisory relationship within act's terms, such relationship was not within contemplation of President's executive order which governed functioning of advisory committees until FACA's passage, and FACA's legislative history does not display intent to widen such order's application to include advisory relationship between Committee and Justice Department. *Public Citizen v United States Dep't of Justice (1989) 491 US 440, 105 L Ed 2d 377, 109 S Ct 2558* (criticized in *In re Richardson (1998, BC MD La) 217 BR 479, 32 BCD 114)* and (criticized in *Manshardt v Fed. Judicial Qualifications Comm. (2005, CA9 Cal) 401 F3d 1014).*

Group that was organized and funded at least in part by certain federal agencies to assist agencies and other agencies with developing strategies for implementing restoration projects in Florida Everglades met definition of advisory committee set forth in *5 USCS App. 2 § 3. Miccosukee Tribe of Indians v S. Everglades Restoration Alliance (2002, CA11 Fla) 304 F3d 1076, 33 ELR 20024, 15 FLW Fed C 976* (criticized in *Int'l Brominated Solvents Ass'n v Am. Conf. of Governmental Indus. Hygienists, Inc. (2004, MD Ga) 20 BNA OSHC 2070).*

Committee formed to recommend nominees for certain federal appointments was not advisory committee within scope of Federal Advisory Committee Act (FACA), *5 USCS App. 2* § 3, because it was not established by statute, agency, or President; moreover, it was not utilized by President for purposes of FACA, particularly since its recommendations were not solicited by *President. Manshardt v Fed. Judicial Qualifications Comm. (2005, CA9 Cal) 408 F3d 1154.*

President's Task Force on National Health Care Reform was not advisory group subject to FACA since First Lady, who was appointed to chair Task Force, was federal employee; Congress has recognized in *3 USCS § 105* that President's spouse is functional equivalent of assistant to President, and President's implicit authority to enlist his spouse in aid of discharge of his federal duties undermines claim that treating President's spouse as officer or employee would violate anti-nepotism provisions of *5 USCS § 3110. Association of Am. Physicians & Surgeons v Clinton (1993, App DC) 302 US App DC 208, 997 F2d 898, 21 Media L R 1705.*

Group advising U.S. Sentencing Commission on environmental crimes was not subject to FACA; Congress clearly excluded Sentencing Commission from APA, which determines FACA coverage, and group was not "utilized" by DOJ, even though members of group from DOJ were likely to exercise significant influence on group's deliberations and ensuing recommendations, since group answered to Commission, not DOJ. *Washington Legal Found. v United States Sentencing Comm'n (1994, App DC) 305 US App DC 93, 17 F3d 1446, 22 Media L R 1338, 25 ELR 21189.*

Panel of experts and consumers convened by Agency for Health Care policy and Research to develop clinical practice guideline on treatment of lower back pain for health care practitioners was not advisory committee under FACA since it was created to develop guidelines for health care practitioners, not to provide advice to federal government, and fact that federal agency used guideline to formulate policy did not make panel advisory committee. *Sofamor Danek Group v Gaus (1995, App DC) 314 US App DC 43, 61 F3d 929,* cert den *(1996) 516 US 1112, 133 L Ed 2d 841, 116 S Ct 910.*

Presidential legal expense trust fund created by President and his wife to defray personal legal fees and related expenses incurred by President in legal proceedings commenced after he assumed office but unrelated to any of his official duties was not "advisory committee" since its main purpose was collecting and managing funds, not giving advice, and, even assuming advice were given, it was not directed to governmental policy. *Judicial Watch v Clinton (1996, App DC) 316 US App DC 179, 76 F3d 1232.*

In case involving issue whether Task Force on National Health Care Reform was advisory committee, attorney's fee award to defendant medical associations would be reversed since evidence of government's bad faith or lack of substantial justification for its litigation position was not clear and convincing, although district court on remand might consider whether sanctions on other grounds were warranted. *Association of Am. Physicians & Surgeons, Inc. v Clinton (1999, App DC) 337 US App DC 394, 187 F3d 655.*

Task forces organized by nonprofit foundation to assist Executive Committee of Private Sector Survey, appointed pursuant to Executive Order No. 12369, to conduct in-depth reviews of Executive Branch operations and to advise President, Secretary of Commerce and heads of other Federal agencies on cost-effective management, are not advisory committees within meaning of Federal Advisory Committee Act and thus subject to same procedural requirements as Executive Committee itself, since task forces do not provide advice directly to President or any agency but advise only Executive Committee. *National Anti-Hunger Coalition v Executive Committee of President's Private Sector Survey on Cost Control (1983, DC Dist Col) 557 F Supp 524,* affd (1983, App DC) *229 US App DC 143, 711 F2d 1071.*

Committee which has primarily operational activities and whose advisory capacity is secondary to operational activities, is not advisory committee; National Industries for the Severely Handicapped, as nonprofit corporation is not advisory committee since it is operational component of program which recommends commodities, services and prices for consideration and has limited advisory capacity. HLI Lordship Indus. v Committee for Purchase from *Blind & Other Severely Handicapped (1985, ED Va) 615 F Supp 970,* revd on other grounds, remanded (1986, CA4 Va) *791 F2d 1136.*

Commission on Bicentennial of the United States Constitution, created by P.L. 98-101, 97 Stat. 719, is not advisory committee since list of duties of commission do not include rendition of advice but rather include operational duties. *Public Citizen v Commission on Bicentennial of United States Constitution (1985, DC Dist Col) 622 F Supp 753.*

Six private United States citizens, each expert in nuclear physics, engineering, and systems management, informally invited by Department of Energy Secretary to examine safety of plutonium production reactor in Richland, Washington, do not constitute "advisory committee" under Federal Advisory Committee Act since (1) experts work independently and report findings alone rather than acting as a committee, and (2) legislative history indicates Act's prime concern is to prevent committees from being controlled by special interest groups, and 6 individuals gained no selfish advantage by serving on advisory panel. *Natural Resources Defense Council, Inc. v Herrington (1986, DC Dist Col) 637 F Supp 116.*

Expert panel of scientists is advisory committee subject to balanced membership and public meeting requirements of Federal Advisory Committee Act *(5 USCS Appx §§ 1* et seq.), where FDA solicited bids for contract to provide it with counsel on important future issues concerning safety of food and cosmetics, and group awarded contract suggested and was subsequently ordered by FDA to assemble expert panel to prepare report to contractor which would review it and then report to FDA, because material facts demonstrate that expert panel was "established" by and is being "utilized" by FDA within meaning of Act. *Food Chemical News v Young (1989, DC Dist Col) 709 F Supp 5, 35* CCF P 75632, revd (1990, App DC) *283 US App DC 344, 900 F2d 328,* cert den *(1990) 498 US 846, 112 L Ed 2d 99, 111 S Ct 132.*

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 4

§ 4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—
(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

HISTORY:
(Oct. 6, 1972, P.L. 92-463, § 4, 86 Stat. 771.)

NOTES:
Research Guide:
Federal Procedure:
15 Fed Proc L Ed, Freedom of Information §§ 38:19.

Am Jur:
37A Am Jur 2d, Freedom of Information Acts § 34.

Annotations:
Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-*15]. *160 ALR Fed 483.*

Interpretive Notes and Decisions:

Plain meaning of Federal Advisory Committee Act § 4(c) is clear; as proviso, it should be construed narrowly as including state and local committees functioning at state or local level and not at federal level. *Center for Auto Safety v Cox (1978, App DC) 188 US App DC 426, 580 F2d 689.*

Action by manufacturer of prescription medical devices used in spinal surgery, seeking to bar government from publishing its Clinical Practice Guideline (CPG) for acute low-back pain on ground that CPG was generated by panel convened in violation of Federal Advisory Committee Act (5 USCS Appx), is dismissed, where CPG panels are established by agency, not by statute, because panels do not fall within scope of Act. *Sofamor Danek Group v Clinton (1994, DC Dist Col) 870 F Supp 379.*

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 5

§ 5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

HISTORY:

(Oct. 6, 1972, § 5, 86 Stat. 771.)

NOTES:

Research Guide:

Am Jur:

77 Am Jur 2d, United States § 29.

Annotations:

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-*15]. *160 ALR Fed 483.*

Law Review Articles:

Tuerkheimer. Veto by Neglect: The Federal Advisory Committee Act. *25 Am U L Rev 53, 1975.*

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

Perritt; Wilkinson. Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years. *63 Geo L J 725, 1975.*

The Federal Advisory Committee Act. *10 Harv J Legis 217, 1973.*

Interpretive Notes and Decisions:

1. Balanced membership requirement 2. Review of committee actions 3. Standing to challenge committee actions

1. Balanced membership requirement

Individual nominees' challenge, to Secretary of Department of Interior's appointment of members to resource advisory counsels, was dismissed in part because balanced membership requirement of *5 USCS app. 2* § 5(b)(3) did not provide meaningful standard of review for court to apply. *Colo. Envtl. Coalition v Wenker (2004, CA10 Colo) 353 F3d 1221.*

Executive Committee of Private Sector Survey, appointed by President pursuant to Executive Order No. 12369, is "balanced" within meaning of § 5 of Federal Advisory Committee Act (5 USCS Appx), notwithstanding that membership of 150-member committee includes no public interest advocates and no beneficiaries of Federal food assistance programs, since (1) purpose of Survey is to apply to Federal programs expertise of leaders in private sector with special abilities to give detailed advice on cost-effective management of large organizations, which purpose would not necessarily be advanced by inclusion of public interest groups or members of public receiving Federal benefits among membership of committee, and (2) Act does not explain meaning of term "balanced". *National Anti-Hunger Coalition v Executive Committee of President's Private Sector Survey on Cost Control (1983, DC Dist Col) 557 F Supp 524,* affd (1983, App DC) *229 US App DC 143, 711 F2d 1071.*

Membership of National Advisory Committee on Microbiological Criteria for Foods is properly balanced under § 5(b) of Federal Advisory Committee Act *(5 USCS Appx § 5*(b)), notwithstanding claim that "consumer representative or advocate" has not been appointed; food industry employment or consulting background of several members is not to be equated with anti-regulatory sentiments. *Public Citizen v National Advisory Committee on Microbiological Criteria for Foods (1988, DC Dist Col) 708 F Supp 359,* affd (1989, App DC) *281 US App DC 1, 886 F2d 419.*

National Women's Conference does not violate "balance" requirements of Federal Advisory Committee Act since Commission regulations on organization and conduct of State meetings, where Conference delegates are selected, afford extremely broad basis for participation and leaves degree of "balance" essentially to participants through normal democratic process; objective of balance goes only to composition of voting bodies rather than support or opposition on any given issue. *(1977) 57 Comp Gen 51.*

2. Review of committee actions

Federal Advisory Committee Act provides for 3 separate sources of review to insure that network of federal advisory committees is operating as effectively and efficiently as possible; first source of review is Congress itself under FACA § 5(a), second source is Director of Office of Management and Budget under authority of § 7(b), and third is head of federal agency utilizing advisory committee who monitors performance of committee under authority of § 8. *Metcalf v National Petroleum Council (1977, App DC) 180 US App DC 31, 553 F2d 176, 7 ELR 20218.*

State environmental protection agency may not challenge recommendation of FDA advisory committee on grounds that advisory committee was not fairly balanced as required under *5 USCS Appx §§ 5*(b)(2), (c), where committee recommended that Congress pass legislation preempting additional and conflicting state requirements, because no judicially manageable standards exist to review fair balance requirement. *Public Citizen v HHS (1992, DC Dist Col) 795 F Supp 1212* (criticized in *Northwest Ecosystem Alliance v Office of the United States Trade Representative (1999, WD Wash) 1999 US Dist LEXIS 21689).*

3. Standing to challenge committee actions

Mine owners had standing to challenge defendant National Institution for Occupational Safety and Health's and others' alleged violation of Federal Advisory Committee Act by employing NIOSH's Board of Scientific Counselors (BSC) to peer-review protocol to govern planned study of health effects of exposure to diesel exhaust and filing BSC's charter with wrong congressional committee, since it suffered injury in fact in that it prevented effective congressional monitoring of BSC and mines had compelling interest in ensuring that study's results were accurate. *Cargill, Inc. v United States (1999, CA5 La) 173 F3d 323, 18 BNA OSHC 1685, 1999* CCH OSHD P 31814.

In action brought by United States senator under Federal Advisory Committee Act, seeking to enjoin operation of National Petroleum Council on ground that council was illegally dominated by petroleum industry, 140 members out of 155 being affiliated with petroleum industry, district court dismissal for lack of standing by plaintiff would be affirmed, plaintiff's allegations that council's deficient advice would result in governmental policies unfavorable to consumers and to environment being purely speculative and conjectural, and his complaint that poor advice from Council would impede his efforts to produce best possible legislative product being insufficiently specific. *Metcalf v National Petroleum Council (1977, App DC) 180 US App DC 31, 553 F2d 176, 7 ELR 20218.*

Members of group denied membership on Executive Committee of Private Sector Survey, appointed by President pursuant to Executive Order No. 12369, to conduct in-depth reviews of Executive Branch Operations and to advise President, Secretary of Commerce and heads of other Federal agencies on cost-effective management have standing to challenge membership of Executive Committee on grounds of lack of "balance" as required by § 5 of Act. *National Anti-Hunger Coalition v Executive Committee of President's Private Sector Survey on Cost Control (1983, DC Dist Col) 557 F Supp 524,* affd (1983, App DC) *229 US App DC 143, 711 F2d 1071.*

Nonprofit public interest law center has standing to assert claim against American Bar Association Standing Committee under § 5(b) of Federal Advisory Committee Act, where Committee contends center's interest in its activities of reviewing professional qualifications of and rating possible federal judgeship nominees is too remote and speculative to confer standing, because center's claim that defendant is regularly consulting with liberal public interest groups to exclusion of conservative public interest organizations like itself charges that it has been "directly affected" by lack of balance on Committee. *Washington Legal Foundation v American Bar Asso. Standing Committee on Federal Judiciary (1986, DC Dist Col) 648 F Supp 1353.*

"Stop ERA" group lacked standing to protest alleged violation by National Commission on Observance of International Women's Year of FACA § 5(b)(2) by support of Equal Rights Amendment. *Mulqueeny v National Com. on Observance of International Women's Year, 1975 (1977, CA7 Ill) 549 F2d 1115.*

6 of 16 DOCUMENTS

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 6

§ 6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated

annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such a report a statement that such information is excluded.

HISTORY:

(Oct. 6, 1972, § 6, 86 Stat. 772; Dec. 21, 1982, P.L. 97-375, Title II, § 201(c) in part, 96 Stat. 1822.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1982. Act Dec. 21, 1982 (effective 7/1/83, as provided by § 201(c) in part of such Act), in subsec. (c), substituted "The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year." for "The President shall, not later than March 31 of each calendar year (after the year in which this Act is enacted [enacted Oct. 6, 1972]), make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year.".

Other provisions:

Termination of reporting requirements. For termination, effective May 15, 2000, of provisions of subsec. (c) of this section relating to periodic reports to Congress, see § 3003 of Act Dec. 21, 1995, P.L. 104-66, which appears as *31 USCS § 1113* note. See also page 173 of House Document No. 103-7.

NOTES:

Research Guide:

Am Jur:

77 Am Jur 2d, United States § 29.

Annotations:

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-15]. 160 ALR Fed 483.*

Law Review Articles:

Tuerkheimer. Veto by Neglect: The Federal Advisory Committee Act. *25 Am U L Rev 53, 1975.*

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

Perritt; Wilkinson. Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years. *63 Geo L J 725, 1975.*

The Federal Advisory Committee Act. *10 Harv J Legis 217, 1973.*

Interpretive Notes and Decisions:

Group that was organized by federal agencies to render advise over restoration projects was advisory committee that was subject to obligations of Federal Advisory Committee Act, *5 USCS App. 2* § 1 et seq. *Miccosukee Tribe of Indians v S. Everglades Restoration Alliance (2002, CA11 Fla) 304 F3d 1076, 33 ELR 20024, 15 FLW Fed C 976* (criticized in *Int'l Brominated Solvents Ass'n v Am. Conf. of Governmental Indus. Hygienists, Inc. (2004, MD Ga) 20 BNA OSHC 2070).*

Although under § 6 of Federal Advisory Committee Act, there do not appear to be any statutory criteria for selection of State Coordinating Committees, it could not be argued reasonably that National Commission on Observance of International Woman's Year had not done responsible job of setting up Illinois State Coordinating Committee, even though it might be true that of 59 members, only one was in outspoken opposition to ratification of Equal Rights Amendment;

Commission had sought nominations from many diverse organizations and individuals, and asserted that in selection process there was also conscious attempt to designate people with range of views on some of more controversial issues. *Hall v Siegel (1977, SD Ill) 467 F Supp 750.*

7 of 16 DOCUMENTS

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 7

§ 7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Director [Administrator] shall establish and maintain within the Office of Management and Budget [General Services Administration] a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Director [Administrator] shall, immediately after the enactment of this Act [enacted Oct. 6, 1972], institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—
(1) whether such committee is carrying out its purpose;
(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;
(3) whether it should be merged with other advisory committees; or
(4) whether is should be abolished.

The Director [Administrator] may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Director's [Administrator's] review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Director [Administrator] shall carry out a similar review annually. Agency heads shall cooperate with the Director [Administrator] in making the reviews required by this subsection.

(c) The Director [Administrator] shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Director [Administrator] shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d) (1) The Director [Administrator], after study and consultation with the Civil Service Commission [Director of the

Office of Personnel Management], shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under *section 5332 of title 5, United States Code*;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by *section 5703 of title 5, United States Code*, for persons employed intermittently in the Government service; and

(C) such members—

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*)), and

(ii) who do not otherwise qualify for assistance under *section 3102 of title 5, United States Code*, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such title 5,

may be provided services pursuant to section 3102 of such title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent—

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Director [Administrator] shall include in budget recommendations a summary of the amounts be deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

HISTORY:

(Oct. 6, 1972, P.L. 92-463, § 7, 86 Stat. 772; Dec. 12, 1980, P.L. 96-523, § 2, 94 Stat. 3040.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed words "Administrator", "General Services Administration", and "Administrator's" are inserted in this section on the authority of Reorg. Plan No. 1 of 1977, § 5F, *42 Fed. Reg. 56101,* 91 Stat. 1634, which appears as *5 USCS § 903* note, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Or. No. 12024 of Dec. 1, 1977, *42 Fed. Reg. 61445,* which appears as a note to § 2 of this act.

The bracketed words "Director of the Office of Personnel Management" are inserted in subsec. (d)(1) of this section, because, all functions vested by statute in the Civil Service Commission, except as otherwise specified, were transferred to the Director of the Office of Personnel Management by Reorg. Plan No. 2 of 1978, *43 Fed. Reg. 36037,* 92 Stat. 3784, located at *5 USCS § 1101* note, effective Jan. 1, 1979, as provided by Ex. Or. No. 12107 of Dec. 28, 1978, § 1-102, *44 Fed. Reg. 1055,* located at *5 USCS § 1101* note.

Amendments:

1980. Act Dec. 12, 1980 (effective 60 days after enactment on 12/12/80, as provided by § 3 of such Act, which appears as *5 USCS § 3102* note), in subsec. (d)(1), in subpara. (A), deleted "and" following the semicolon, in subpara. (B), substituted "; and" for the concluding period, and added subpara. (C).

Other provisions:

GS 16-18 pay rates. Act Nov. 5, 1990, P.L. 101-509, Title V, § 529 [Title I, § 101(c)-(e)], 104 Stat. 1442, which appears as *5 USCS § 5376* note, provides for the construction of references to rates of pay for GS 16-18 employees.

NOTES:

Related Statutes & Rules:

This section is referred to in *5 USCS § 568.*

Research Guide:
Am Jur:
78 Am Jur 2d, War § 51.

Annotations:
Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2 §§ 1-15 [5 USCS Appx §§ 1-15]. 160 ALR Fed 483.*

Law Review Articles:
Tuerkheimer. Veto by Neglect: The Federal Advisory Committee Act. *25 Am U L Rev 53, 1975.*
Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*
Perrit; Wilkinson. Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years. *63 Geo L J 725, 1975.*
The Federal Advisory Committee Act. *10 Harv J Legis 217, 1973.*

Interpretive Notes and Decisions:

Federal Advisory Committee Act provides for 3 separate sources of review to insure that network of federal advisory committees is operating as effectively and efficiently as possible; first source of review is Congress itself under FACA § 5(a), second source is Director of Office of Management and Budget under authority of § 7(b), and third is head of federal agency utilizing advisory committee who monitors performance of committee under authority of § 8. *Metcalf v National Petroleum Council (1977, App DC) 180 US App DC 31, 553 F2d 176, 7 ELR 20218.*

8 of 16 DOCUMENTS

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 8

§ 8. Responsibilities of agency heads; Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Director [Administrator] under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory

committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of *section 552 of title 5, United States Code*, with respect to such reports, records, and other papers.

HISTORY:

(Oct. 6, 1972, P.L. 92-463, § 8, 86 Stat. 773.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed word "Administrator", referring to the Administrator of General Services, is inserted in subsec. (a) of this section on the authority of Reorg. Plan No. 1 of 1977, § 5F, *42 Fed. Reg. 56101,* 91 Stat. 1634, which appears as *5 USCS § 903* note, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Or. No. 12024 of Dec. 1, 1977, *42 Fed. Reg. 61445,* which appears as a note to § 2 of this act.

NOTES:

Research Guide:

Annotations:

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-*15]. *160 ALR Fed 483.*

Law Review Articles:

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

Interpretive Notes and Decisions:

Federal Advisory Committee Act provides for 3 separate sources of review to insure that network of federal advisory committees is operating as effectively and efficiently as possible; first source of review is Congress itself under FACA § 5(a), second source is Director of Office of Management and Budget under authority of § 7(b), and third is head of federal agency utilizing advisory committee who monitors performance of committee under authority of § 8. *Metcalf v National Petroleum Council (1977, App DC) 180 US App DC 31, 553 F2d 176, 7 ELR 20218.*

Nonprofit public interest law center may not sue American Bar Association Standing Committee under § 8(b) of Federal Advisory Committee Act (5 USCS Appx I), where Committee might be advisory committee by reason of its assistance to President and Justice Department through review and rating of possible federal judgeship nominees, because Act authorizes private cause of action against government but not against private preexisting group advising government. *Washington Legal Foundation v American Bar Asso. Standing Committee on Federal Judiciary (1986, DC Dist Col) 648 F Supp 1353.*

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 9

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is—
(1) specifically authorized by statute or by the President; or
(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Director [Administrator], with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Director [Administrator], in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:
(A) the committee's official designation;
(B) the committee's objectives and the scope of its activity;
(C) the period of time necessary for the committee to carry out its purposes;
(D) the agency or official to whom the committee reports;
(E) the agency responsible for providing the necessary support for the committee;
(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;
(G) the estimated annual operating costs in dollars and man-years for such committee;
(H) the estimated number and frequency of committee meetings;
(I) the committee's termination date, if less than two years from the date of the committee's establishment; and
(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

HISTORY:
(Oct. 6, 1972, P.L. 92-463, § 9, 86 Stat. 773.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed word "Administrator" referring to the Administrator of General Services, is inserted in subsecs. (a)(2) and (c) of this section on the authority of Reorg. Plan No. 1 of 1977, § 5F, *42 Fed. Reg. 56101,* 91 Stat. 1634, which appears as *5 USCS § 903* note, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Or. No. 12024 of Dec. 1, 1977, *42 Fed. Reg. 61445,* which appears as a note to § 2 of this act.

NOTES:

Research Guide:

Annotations:

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-*15]. *160 ALR Fed 483.*

Law Review Articles:

Tuerkheimer. Veto by Neglect: The Federal Advisory Committee Act, *25 Am U L Rev 53, 1975.*

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

Perritt; Wilkinson. Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years. *63 Geo L J 725, 1975.*

The Federal Advisory Committee Act. *10 Harv J Legis 217, 1973.*

Interpretive Notes and Decisions:

1. Generally 2. Function of committee 3. Effect of failure to comply with formation requirements 4. Judicial review

1. Generally

Before advisory committee can begin to function, it must be formally chartered in accordance with § 9(c) of Federal Advisory Committee Act and charter must contain, inter alia, information concerning committee's objectives and scope of its operations and duties; committees are chartered to one federal agency although such committee can serve as advisory committee to other federal agencies. *Metcalf v National Petroleum Council (1977, App DC) 180 US App DC 31, 553 F2d 176, 7 ELR 20218.*

2. Function of committee

Presence of retired Supreme Court Justice and active circuit judge on advisory committee charged with investigating and submitting report on organized crime to President, did not prevent committee from performing its functions since inter alia, (1) judges' presence did not prevent committee from conducting hearings, preparing reports or making recommendations for legislation, (2) committee does not prosecute, indict, or legislate, and (3) while committee was empowered to issue subpoenas, enforcement of subpoenas was reserved to courts; that committee member is a judge does not inhibit use of powers imposed on members, or excuse duty to submit advisory report, ability to make findings and recommendations would be the same in absence of any judge's participation. *In re President's Comm'n on Organized Crime etc. (1986, CA3 NJ) 783 F2d 370.*

Advisory committee exists to advise and not to decide. *Metcalf v National Petroleum Council (1977, App DC) 180 US App DC 31, 553 F2d 176, 7 ELR 20218.*

Under 5 USCS Appendix I § 9(b) advisory committee may be utilized solely for advisory functions but under *15 USCS § 776(a)* Department of Energy may be able to use advisory committee to perform some operational tasks such as drafting of National Energy Policy Plan pursuant to *42 USCS § 7321. (1981) 60 Comp Gen 386.*

3. Effect of failure to comply with formation requirements

When federal agency utilizes advisory committee for purpose of obtaining advice, agency must charter and establish committee in compliance with provisions of § 9 of Federal Advisory Committee Act; however, failure to comply with such requirements cannot be employed as subterfuge for avoiding public access requirements. *Food Chemical News, Inc. v Davis (1974, DC Dist Col) 378 F Supp 1048.*

4. Judicial review

Decision of whether advisory committee, terminated by § 14 of Federal Advisory Committee Act should be re-established is discretionary with particular administrative agency and cannot be reviewed by district court. *Hiatt Grain & Feed, Inc. v Bergland (1978, DC Kan) 446 F Supp 457, 11 Envt Rep Cas 1961,* affd (1979, CA10 Kan) *602 F2d 929,* cert den *(1980) 444 US 1073, 62 L Ed 2d 755, 100 S Ct 1019.*

10 of 16 DOCUMENTS

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 10

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a) (1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Director [Administrator] shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Director [Administrator] may prescribe.

(b) Subject to *section 552 of title 5, United States Code,* the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of *section 552b of title 5, United States Code.* Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related

matters as would be informative to the public consistent with the policy of *section 552(b) of title 5, United States Code.*

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committee), with an agenda approved by such officer or employee.

HISTORY:

(Oct. 6, 1972, P.L. 92-463, § 10, 86 Stat. 774; Sept. 13, 1976, P.L. 94-409, § 5(c), 90 Stat. 1247.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed word "Administrator" referring to the Administrator of General Services, is inserted in subsec. (a)(2) and (3) of this section on the authority of Reorg. Plan No. 1 of 1977, § 5F, *42 Fed. Reg. 56101,* 91 Stat. 1634, which appears as *5 USCS § 903* note, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Or. No. 12024 of Dec. 1, 1977, *42 Fed. Reg. 61445,* which appears as a note to § 2 of this act.

Amendments:

1976. Act Sept. 13 (effective 180 days after enactment on 9/13/76, as provided by § 6 of such Act, which appears as *5 USCS § 552b* note), 1976, in subsec. (d), substituted the first sentence for the one which read: "Subsections (a)(1) and (a)(3) of this section shall not apply to any advisory committee meeting which the President, or the head of the agency to which the advisory committee reports, determines is concerned with matters listed in *section 552(b) of title 5, United States Code.*".

NOTES:

Related Statutes & Rules:

This section is referred to in *5 USCS § 566*; *15 USCS § 4806*; *19 USCS § 2155, 2605*; *20 USCS § 9011*; *30 USCS § 1229*; *42 USCS §§ 6273, 7704*; *46 USCS §§ 4508, 9307*; *49 USCS § 30306.*

Research Guide:

Federal Procedure:

15 Fed Proc L Ed, Freedom of Information §§ 38:19, 20.

Am Jur:

37A Am Jur 2d, Freedom of Information Acts § 35.

Annotations:

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2 §§ 1-15 [5 USCS Appx §§ 1-15].* *160 ALR Fed 483.*

Law Review Articles:

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev. 345.*

Perritt; Wilkinson. Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years. *63 Geo L J 725, 1975.*

The Federal Advisory Committee Act. *10 Harv J Legis 217, 1973.*

Interpretive Notes and Decisions:

1. Generally 2. Closed meetings 3. Relationship with Freedom of Information Act

1. Generally

Under Federal Advisory Committee Act Congress has determined simply that when federal executive official utilizes advisory committee to assist him in discharging his responsibilities, in most instances he must do so openly and publicly; advisory committee has no First Amendment right to have administrator keep its communications secret. *Center for Auto Safety v Cox (1978, App DC) 188 US App DC 426, 580 F2d 689.*

Even if Federal Advisory Committee Act's requirements that agency representative approve agenda of advisory committee meeting as well as § 2's hortatory language that all matters under advisory committee's consideration should be determined by official, agency, or officer forbid advisory committee from taking any action not approved by agency representative and not included in committee's agenda, it does not mean that agency administrator or representative had duty to intervene to prevent committee from voting on resolution not on agenda. *Claybrook v Slater (1997, App DC) 324 US App DC 145, 111 F3d 904* (criticized in *Taylor v FDIC (1997, App DC) 328 US App DC 52, 132 F3d 753).*

Two separate "informal" meetings with consumer and distilled spirits industry representatives relative to drafting proposed regulations of Bureau of Alcohol, Tobacco and Firearms of Treasury Department on ingredient labeling of distilled spirits were meetings of "advisory committees" used by director of bureau to obtain advice within the meaning of Federal Advisory Committee Act and therefore "open to the public". *Food Chemical News, Inc. v Davis (1974, DC Dist Col) 378 F Supp 1048.*

Court has no authority to order federal officials to convene Energy Conservation Advisory Committee and Solar Energy Advisory Committee specific number of times, or to direct committees themselves to issue reports to federal officials, addressing their recommendations to Solar Energy and Energy Conservation Bank, since Federal Advisory Committees, pursuant to § 10(f) may meet only at call of designated officer or employee of Federal Government, who is not required to call meetings if he does not wish to, and since there is no basis for court to direct meetings, there is also no basis to direct committees to report on their activities, since activities and reports thereon are for agency to request or not, as case may be. *Dabney v Reagan (1982, SD NY) 559 F Supp 861.*

Preliminary injunction is granted to prevent President's Task Force on National Health Care Reform from conducting meetings in violation of Federal Advisory Committee Act (FACA) *(5 USCS Appx §§ 1* et seq.), but §§ 10(a)(1), 10(a)(3), and 10(c) are not applicable to meetings held for purpose of formulating advice and recommendations for President, because First Lady (chairperson of task force) is not federal officer or employee, making task force subject to FACA under § 3(2), but forced exposure of "recommendation" meetings under FACA provisions is unconstitutional as violation of separation of powers principles. *Association of Am. Physicians & Surgeons v Clinton (1993, DC Dist Col) 813 F Supp 82, 21 Media L R 1225,* revd, remanded (1993, App DC) *302 US App DC 208, 997 F2d 898, 21 Media L R 1705.*

Nonprofit corporation is not entitled to records pertaining to costs of interdepartmental working group of health-care reform task force, where records were intended to help Congress in its oversight function, because such records are not within scope of § 10(b) of the Federal Advisory Committee Act and because nothing in statute or regulations creates right of public access to such records. *Association of Am. Physicians & Surgeons v Clinton (1994, DC Dist Col) 879 F Supp 103,* dismd (1994, DC Dist Col) *879 F Supp 106.*

2. Closed meetings

Examination of legislative history of Federal Advisory Committee Act clearly indicates that although standard of openness and public inspection was to be applied liberally, it was intention of Congress to provide for closed deliberations under certain conditions, one of which is stated FACA § 10(d). *Aviation Consumer Action Project v Washburn (1976, App DC) 175 US App DC 273, 535 F2d 101.*

Broad application of FACA § 10(d) exemption to include all deliberative conversations to committee meetings is clearly contrary to Congressional intent and policy of Federal Advisory Committee Act. *Nader v Dunlop (1973, DC Dist Col) 370 F Supp 177.*

Agency's failure to charter and establish advisory committee in compliance with all terms of Federal Advisory Committee Act cannot be employed as subterfuge for avoiding public access requirements of FACA § 10. *Food Chemical News, Inc. v Davis (1974, DC Dist Col) 378 F Supp 1048.*

Plaintiff whose request for transcript of advisory committee meetings, which were not open to public as required by FACA § 10, was denied, has standing to sue for their production. *Center for Auto Safety v Tiemann (1976, DC Dist Col) 414 F Supp 215,* remanded (1978, App DC) *188 US App DC 426, 580 F2d 689.*

Environmental group's challenge to EPA's refusal to open to public meetings of Governors' Forum on Environmental Management is denied, where forum made up of 9 state governors meets to help coordinate state and federal efforts to maintain clean and safe drinking water, because, even though forum was established to advise or assist EPA, it is not "advisory committee" subject to public meeting requirements of *5 USCS Appx §§ 9* and 10 since governors also act operationally as independent chief executives in partnership with federal agency. *Natural Resources Defense Council v EPA (1992, DC Dist Col) 806 F Supp 275.*

3. Relationship with Freedom of Information Act

While extent to which exemption 5 of FOIA (*5 USCS § 552(b)(5)*) must be given effect in context of Federal Advisory Committee meetings is undecided, mere disclosure of intra-agency memorandum to advisory committee did not have effect of making such memorandum public information to which exemption 5 was inapplicable. *Aviation Consumer Action Project v Washburn (1976, App DC) 175 US App DC 273, 535 F2d 101.*

Section renders disclosure provisions of FOIA applicable to advisory committees and designates each committee as appropriate repository for its own record; it does not impose upon President or office of administration special responsibility to guide document requests. *National Sec. Archive v Archivist of United States (1990, App DC) 285 US App DC 302, 909 F2d 541, 17 Media L R 2265.*

Agency is generally obligated under § 10(b) of Federal Advisory Committee Act (FACA) to make available for public inspection and copying all materials that were made available to or prepared for or by an advisory committee, and, except for materials agency reasonably believes to be exempt from disclosure pursuant to FOIA, member of public need not request disclosure in order for FACA materials to be made available. *Food Chem. News v Department of Health & Human Servs. (1992, App DC) 299 US App DC 25, 980 F2d 1468, 21 Media L R 1057.*

Member of advisory committee who had all necessary security clearances was entitled to information under FACA that was reviewed and relied upon by committee during its deliberations, even if that information might have been withheld from public pursuant to FOIA exemption. *Cummock v Gore (1999, App DC) 336 US App DC 347, 180 F3d 282.*

While Federal Advisory Committee Act does not contain same express provision of Freedom of Information Act placing burden of proof on agency to sustain action under *5 USCS § 552(b),* underlying policy considerations are identical and burden of proof is on advisory committee to support claimed exemption by substantial justification and explanation of basis of claim, not merely by conclusory assertions; Defense Advisory Committee on Women in the Services is not "agency" and matters before it are, therefore, not "inter-agency" within meaning of *5 USCS § 552(b)* exception to openness of advisory committee meetings under FACA § 10(d). *Gates v Schlesinger (1973, DC Dist Col) 366 F Supp 797.*

Newsletter reporter is not entitled to preliminary injunction preventing meetings of Advisory Committee on Food and Drug Administration until drafts, working papers, and other documents are publicly released under Federal Advisory Committee Act *(5 USCS Appx §§ 1* et seq.), where Committee notified reporter to refer all document requests to HHS's Freedom of Information Office, because Committee properly interprets *5 USCS Appx § 10*(b), which makes advisory committee documents "subject to" *5 USCS § 552* (FOIA), as incorporating FOIA procedures as well as FOIA exemptions. *Food Chemical News v Advisory Committee on Food & Drug Admin. (1991, DC Dist Col) 760 F Supp 220,* affd, clarified (1992, App DC) *299 US App DC 25, 980 F2d 1468, 21 Media L R 1057.*

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 11

§ 11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in *section 551(12) of title 5, United States Code.*

HISTORY:
(Oct. 6, 1972, P.L. 92-463, § 11, 86 Stat. 775.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
"The effective date of this Act", referred to in this section, is 90 days following the enactment of Act Oct. 6, 1972, P.L. 92-463, as provided by § 15 of such Act.

NOTES:
Related Statutes & Rules:
This section is referred to in *15 USCS § 4806*; *19 USCS §§ 2155, 2605*; *20 USCS § 9011*; *42 USCS § 6273.*

Research Guide:
Federal Procedure:
15 Fed Proc L Ed, Freedom of Information §§ 38:19, 20.

Am Jur:
37A Am Jur 2d, Freedom of Information Acts § 35.

Annotations:
Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2 §§ 1-15 [5 USCS Appx §§ 1-15]). 160 ALR Fed 483.*

Law Review Articles:
Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 12

§ 12. Fiscal and administrative provisions; recordkeeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

HISTORY:
(Oct. 6, 1972, P.L. 92-463, § 12, 86 Stat. 775.)

NOTES:
Related Statutes & Rules:
This section is referred to in *20 USCS § 9011*.

Research Guide:
Annotations:
Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-15]*. *160 ALR Fed 483.*

Law Review Articles:
Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

Interpretive Notes and Decisions:

Plaintiff whose request for transcript of advisory committee meetings was denied, has standing to sue for their production. *Center for Auto Safety v Tiemann (1976, DC Dist Col) 414 F Supp 215,* remanded (1978, App DC) *188 US App DC 426, 580 F2d 689.*

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 13

§ 13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to *section 552 of title 5, United States Code*, the Director [Administrator] shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

HISTORY:
(Oct. 6, 1972, P.L. 92-463, § 13, 86 Stat. 775.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:
The bracketed word "Administrator", referring to the Administrator of General Services, is inserted in this section on the authority of Reorg. Plan No. 1 of 1977, § 5F, *42 Fed. Reg. 56101,* 91 Stat. 1634, which appears as *5 USCS § 903* note, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Or. No. 12024 of Dec. 1, 1977, *42 Fed. Reg. 61445,* which appears as a note to § 2 of this act.

NOTES:
Research Guide:
Am Jur:
54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 224.

Annotations:
Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-15]). 160 ALR Fed 483.*

Law Review Articles:
Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 14

§ 14. Termination of advisory committees; renewal; continuation

(a) (1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b) (1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

HISTORY:

(Oct. 6, 1972, P.L. 92-463, § 14, 86 Stat. 776.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The effective date of this Act", referred to in this section, is 90 days following the enactment of Act Oct. 6, 1972, P.L. 92-463, as provided by § 15 of such Act.

Other provisions:

Ex. Or. No. 11827 (superseded). Ex. Or. No. 11827 of Jan. 4, 1975, *40 Fed. Reg. 1217,* which formerly appeared as a note to this section, was superseded by Ex. Or. No. 11948 of Dec. 20, 1976, *41 Fed. Reg. 55705.* The superseded note provided for the continuance of certain Federal advisory committees.

Ex. Or. No. 11948 (superseded). Ex. Or. No. 11948 of Dec. 20, 1976, *41 Fed. Reg. 55705,* as amended by Ex. Or. No. 12007 of Aug. 22, 1977, *42 Fed. Reg. 42839;* Ex. Or. No. 12029 of Dec. 14, 1977, *42 Fed. Reg. 63631,* formerly set out as a note under this section, was superseded by Ex. Or. No. 12110 of Dec. 28, 1978, *44 Fed. Reg. 1069.* The superseded note provided for the continuance of certain Federal advisory committees.

Termination of certain Presidential advisory committees. Ex. Or. No. 12007 of Aug. 22, 1977, *42 Fed. Reg. 42839* provided:

"By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in order to terminate certain advisory committees in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App.), it is hereby ordered as follows:

"Section 1. (a) The Citizens' Advisory Council on the Status of Women is terminated.

"(b) Executive Order No. 11126 of November 1, 1963, as amended by Executive Order No. 11221 of May 6, 1965 [*42 USCS § 2000e* note], is further amended as follows:

"(1) Subsection (5) of Section 102 is revoked.

"(2) Section 103, in order to delete a reference to the Council, is amended to read as follows:

'Annually the Committee shall transmit a report to the President concerning the status of women.'

"(3) Part II is revoked.

"(4) The second sentence of Section 301, in order to delete references to the Council, is amended to read as follows:

'To the extent practical and to the extent permitted by law (1) all Executive agencies shall cooperate with the Committee and furnish it such information and assistance as may be necessary for the performance of its functions, and (2) the Secretary of Labor shall furnish staff, office space, office facilities and supplies, and other necessary assistance, facilities, and services for the Committee.'

"Sec. 2. (a) The Citizens' Advisory Committee on Environmental Quality is terminated.

"(b) Part II of Executive Order No. 11472 of May 29, 1969, as amended by paragraphs (7) and (8) of Section 4 of Executive Order No. 11514 of March 5, 1970 [*42 USCS § 4321* note], is revoked.

"Sec. 3. (a) The Advisory Council for Minority Enterprise is terminated.

"(b) Section 2 of Executive Order No. 11625 of October 13, 1971 [*15 USCS § 631* note], is revoked.

"Sec. 4. (a) The Consumer Advisory Council is terminated.

"(b) Executive Order No. 11583 of February 24, 1971 [*20 USCS § 887d* note] is amended as follows:

"(1) The second sentence of subsection (b)(1) of Section 2 is amended by deleting '(including the Consumer Advisory Council established in section 5 of this order)'.

"(2) Section 5 is revoked.

"Sec. 5. (a) The President's Advisory Board on International Investment is terminated.

"(b) Executive Order No. 11962 of January 19, 1977 [*22 USCS § 3107* note] is revoked.

"Sec. 6. Subsections (a), (g), (i), and (j) of Section 1 of Executive Order No. 11948 of December 20, 1976 [formerly set out as a note to this section], which extended the above advisory committees until December 31, 1978, is superseded.".

Quetico-Superior Committee terminated. Ex. Or. No. 12029 of Dec. 14, 1977, *42 Fed. Reg. 63631* provided:

"By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in order to terminate an advisory committee in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App.), it is hereby ordered as follows:

"Section 1. (a) The Quetico-Superior Committee is terminated.

"(b) Executive Order No. 11342, as amended, is revoked.

"Sec. 2. Subsection (e) of Section 1 of Executive Order No. 11948 of December 20, 1976 [formerly set out as a note under this section], which extended the above advisory committee until December 31, 1978, is superseded.".

Ex. Or. No. 12110 (superseded). Ex. Or. No. 12110 of Dec. 28, 1978, § 1-104, *44 Fed. Reg. 1069,* formerly set out as a note to this section, was superseded by Ex. Or. No. 12258 of Dec. 31, 1980, *45 Fed. Reg. 1251.* It provided for continuance of certain Federal advisory committees.

Advisory Committee on Small and Minority Business Ownership. Ex. Or. No. 12190 of Feb. 1, 1980, *45 Fed. Reg. 7773* (*15 USCS § 636* note), provided that the Advisory Committee on Small and Minority Business Ownership shall terminate on December 31, 1980.

State Planning Council on Radioactive Waste Management. Ex. Or. No. 12192 of Feb. 12, 1980, *45 Fed. Reg. 9729,*

set out as an Other provisions note to *42 USCS § 2021*, provided that the State Planning Council on Radioactive Waste Management "shall terminate thirty days after it transmits its final report to the President, but in no event shall it terminate later than eighteen months after the effective date of this Order."

Section 1-101(h) of Ex. Or. No. 12258 (revoked). Ex. Or. No. 12258 of Dec. 31, 1980, § 1-101(h), *46 Fed. Reg. 1251;* as amended by Ex. Or. No. 12271 of Jan. 15, 1981, *46 Fed. Reg. 4677;* Ex. Or. No. 12299 of March 17, 1981, *46 Fed. Reg. 17751,* formerly classified as a note to this section, was revoked by Ex. Or. No. 12336 of Dec. 21, 1981, § 4(a), *46 Fed. Reg. 62239,* which appears as *42 USCS § 2000e* note. It provided for further continuance of President's Advisory Committee for Women.

Termination of certain Federal advisory committees. Ex. Or. No. 12305 of May 5, 1981, *46 Fed. Reg. 25421,* provided:

"By the authority vested in me as President by the Constitution of the United States of America, and in accordance with the provisions of the Federal Advisory Committee Act, as amended [5 U.S.C. App.], the following Executive Orders, establishing advisory committees, are hereby revoked and the committees terminated:

"(a) Executive Order No. 12059 of May 11, 1978, as amended, establishing the United States Circuit Judge Nominating Commission [former *28 USCS § 44* note];

"(b) Executive Order No. 11992 of May 24, 1977, establishing the Committee on Selection of Federal Judicial Officers [former *28 USCS prec. § 1* note];

"(c) Executive Order No. 12084 of September 27, 1978, as amended by Executive Order 12097 of November 8, 1978, establishing the Judicial Nominating Commission for the District of Puerto Rico [former *28 USCS § 133* note]; and

"(d) Executive Order No. 12064 of June 5, 1978, establishing the United States Tax Court Nominating Commission [former *26 USCS § 7443* note].

"Subsections (g), (i), (j) and (k) of Section 1-101 of Executive Order No. 12258 [former note to this section], extending these committees, are also revoked.".

Termination of boards, committees, and commissions. Ex. Or. No. 12379 of Aug. 17, 1982, *47 Fed. Reg. 36099,* provides:

"By the authority vested in me as President by the Constitution and statutes of the United States of America, and to terminate the establishing authorities for committees that are inactive or no longer necessary, it is hereby ordered as follows:

"Section 1. Executive Order No. 12071, as amended [*29 USCS § 1001* note], establishing the President's Commission on Pension Policy, is revoked.

"Sec. 2. Executive Order No. 12042 [unclassified], creating a Board of Inquiry to Report on Labor Disputes Affecting the Bituminous Coal Industry in the United States, is revoked.

"Sec. 3. Executive Order No. 12085 [unclassified], creating an Emergency Board to Investigate a Dispute Between the Norfolk and Western Railway Company and Certain of Its Employees, is revoked.

"Sec. 4. Executive Order No. 12132 [unclassified], creating an Emergency Board to Investigate a Dispute Between the National Railway Labor Conference and Certain of Its Employees, is revoked.

"Sec. 5. Executive Order No. 12095 [unclassified], creating an Emergency Board to Investigate a Dispute Between Wien Air Alaska, Inc., and Certain Individuals, is revoked.

"Sec. 6. Executive Order No. 12159 [unclassified], creating an Emergency Board to Investigate Disputes Between the Chicago, Rock Island, Pacific Railroad and Peoria Terminal Company and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, and the United Transportation Union, is revoked.

"Sec. 7. Executive Order No. 12182 [unclassified], creating an Emergency Board to Investigate a Dispute Between the Long Island Rail Road and Certain of Its Employees, is revoked.

"Sec. 8. Executive Order No. 12207 [unclassified], creating an Emergency Board to Investigate a Dispute Between the Port Authority Trans-Hudson Corporation and Certain of Its Employees, is revoked.

"Sec. 9. Executive Order No. 12262 [*29 USCS § 1001* note], establishing an Interagency Employee Benefit Council, is revoked.

"Sec. 10. Executive Order No. 12275 [*20 USCS § 951* note], establishing the Design Liaison Council, is revoked.

"Sec. 11. Executive Order No. 11829, as amended [*25 USCS § 640d* note], establishing the Hopi-Navajo Land Settlement Interagency Committee, is revoked.

"Sec. 12. Executive Order No. 11022, as amended [*42 USCS § 3001* note], establishing the President's Council on Aging, is revoked.

"Sec. 13. Executive Order No. 12192 [*42 USCS § 2021* note], establishing the State Planing Council on Radioactive Waste Management, is revoked.

"Sec. 14. Executive Order No. 12075 [*42 USCS § 1450* note], as amended, establishing the Interagency Coordinating Council, is revoked.

"Sec. 15. Executive Order No. 11782 [*12 USCS § 2281* note], establishing the Federal Financing Bank Advisory Council, is revoked.

"Sec. 16. Executive Order No. 12089, as amended [*15 USCS § 2401* note], establishing the National Productivity Council, is revoked.

"Sec. 17. Executive Order No. 11330, as amended *[42 USCS prec § 2711* note], establishing the President's Council on Youth Opportunity, is revoked.

"Sec. 18. Executive Order No. 11256 [unclassified], establishing the President's Committee on Food and Fiber and establishing the National Advisory Commission on Food and Fiber, is revoked.

"Sec. 19. Executive Order No. 11654 [*15 USCS § 278f* note], continuing the Federal Fire Council, is revoked.

"Sec. 20. Executive Order No. 12083, as amended [*42 USCS § 7101* note], establishing the Energy Coordinating Committee, is revoked.

"Sec. 21. Executive Order No. 12285, as amended and ratified [*50 USCS § 1701* note], establishing the President's Commission on Hostage Compensation, is revoked.

"Sec. 22. Executive Order No. 12202, as amended [*42 USCS § 5848* note], establishing the Nuclear Safety Oversight Committee, is revoked.

"Sec. 23. Executive Order No. 12194 [*42 USCS § 4321* note], establishing the Radiation Policy Council, is revoked.

"Sec. 24. The Veterans' Federal Coordinating Committee (Weekly Compilation of Presidential Documents, volume 14, number 41, page 1743) [unclassified] is terminated.

"Sec. 25. The President's Council on Energy Efficiency (Weekly Compilation of Presidential Documents, volume 16, numbers 18 and 30, pages 790 and 1404) [unclassified] is terminated.".

Ex. Or. No. 12399 (superseded). Ex. Or. No. 12399 of Dec. 31, 1982, *48 Fed. Reg. 379,* which formerly appeared as a note to this section, was superseded by Ex. Or. No. 12435 of Sept. 30, 1985, *50 Fed. Reg. 40319.* Such note provided for the continuance of certain federal advisory committees.

Ex. Or. No. 12489 (superseded). Ex. Or. No. 12489 of Sept. 28, 1984, *49 Fed. Reg. 38927,* which formerly appeared as a note to this section, was superseded by Ex. Or. No. 12534 of Sept. 30, 1985, *50 Fed. Reg. 40319.* Such note provided for continuance of certain federal advisory committees.

Ex. Or. No. 12534 (superseded). Ex. Or. No. 12534 of Sept. 30, 1985, *50 Fed. Reg. 40319,* which formerly appeared as a note to this section, was superseded by Ex. Or. No. 12610 of Sept. 30, 1987, *52 Fed. Reg. 36901.* Such note provided for continuance of certain federal advisory committees.

Ex. Or. No. 12610 (superseded). Ex. Or. No. 12610 of Sept. 30, 1987, *52 Fed. Reg. 36901,* which formerly appeared as a note to this section, was superseded by Ex. Or. No. 12692 of Sept. 29, 1989, *54 Fed. Reg. 40627.* Such note provided for continuation of certain Federal advisory committees.

Ex. Or. No. 12692 (superseded). Ex. Or. No. 12692 of Sept. 29, 1989, *54 Fed. Reg. 40627,* which formerly appeared as a note to this section, was superseded by § 4 of Ex. Or. No. 12774 of Sept. 27, 1991, *56 Fed. Reg. 49836.* Such note provided for continuation of certain Federal advisory committees.

Ex. Or. No. 12774 (superseded). Ex. Or. No. 12774 of Sept. 27, 1991, *56 Fed. Reg. 49835,* which formerly appeared as a note to this section, was superseded by Ex. Or. No. 12869 of Sept. 30, 1993, *58 Fed. Reg. 51751,* effective Sept. 30, 1993. It provided for continuance of certain Federal advisory committees.

Termination and limitation of Federal advisory committees. Ex. Or. No. 12838 of Feb. 10, 1993, *58 Fed. Reg. 8207,* provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Advisory Committee Act ('FACA'), as amended (5 U.S.C. App.), it is hereby ordered as follows:

"Section 1. Each executive department and agency shall terminate not less than one-third of the advisory committees subject to FACA (and not required by statute) that are sponsored by the department or agency by no later than the end of fiscal year 1993.

"Sec. 2. Within 90 days, the head of each executive department and agency shall submit to the Director of the Office of Management and Budget, for each advisory committee subject to FACA sponsored by that department or agency: (a) a detailed justification for the continued existence, or a brief description in support of the termination, of any advisory committee not required by statute; and (b) a detailed recommendation for submission to the Congress to continue or to terminate any advisory committee required by statute. The Administrator of General Services shall prepare such justifications and recommendations for each advisory committee subject to FACA and not sponsored by a department or agency.

"Sec. 3. Effective immediately, executive departments and agencies shall not create or sponsor a new advisory committee subject to FACA unless the committee is required by statute or the agency head (a) finds that compelling considerations necessitate creation of such a committee, and (b) receives the approval of the Director of the Office of Management and Budget. Such approval shall be granted only sparingly and only if compelled by considerations of national security, health or safety, or similar national interests. These requirements shall apply in addition to the notice and other approval requirements of FACA.

"Sec. 4. The Director of the Office of Management and Budget shall issue detailed instructions regarding the implementation of this order, including exemptions necessary for the delivery of essential services and compliance with applicable law.

"Sec. 5. All independent regulatory commissions and agencies are requested to comply with the provisions of this order.".

Ex. Or. No. 12869 (superseded). Ex. Or. No. 12869 of Sept. 30, 1993, *58 Fed. Reg. 51751;* Ex. Or. No. 12882, Nov. 23, 1993, *58 Fed. Reg. 62493,* formerly classified as a note to this section, was superseded by Ex. Or. No. 12974 of Sept. 29, 1995, *60 Fed. Reg. 51875,* effective Sept. 30, 1995. It provided for continuation of certain Federal advisory committees.

Ex. Or. No. 12974 (revoked). Ex. Or. No. 12974, which formerly appeared as a note to this section, was superseded by Ex. Or. No. 13062 of Sept. 29, 1997, *62 Fed. Reg. 51755.* It provided for continuance of certain Federal advisory committees.

Continuance of certain Federal advisory committees and amendments to Executive Orders 13038 and 13054. Ex. Or. No. 13062 of Sept. 29, 1997, *62 Fed. Reg. 51755;* Ex. Or. No. 13138 of Sept. 30, 1999, *64 Fed. Reg. 53879,* provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, and in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), it is hereby ordered as follows:

"Sections 1-4. [Superseded—These sections provided for continuance of certain advisory committees; performance of functions of the President; revocation of certain Executive Orders which established committees that have terminated and whose work is completed; and supersession of Ex. Or. No. 12974.]

"Sec. 5. In Executive Order 13038 [*47 USCS § 336* note], the second sentence of section 1 is amended by deleting '15' and inserting '22' in lieu thereof.

"Sec. 6. Executive Order 13054 [*22 USCS § 3310* note] is amended by revising section 1 to read as follows: 'A United States citizen who is a family member of a Federal civilian employee who has separated from Federal service to accept employment with the American Institute in Taiwan pursuant to section 11 of Public Law 96-8 (*22 U.S.C. 3310(a)*) may be appointed noncompetitively in a manner similar to noncompetitive appointments under Executive Order 12721 [*5 USCS § 3301* note] and implementing regulations of the Office of Personnel Management to a competitive service position in the executive branch, provided such family member meets the qualifications and other requirements established by the Director of the Office of Personnel Management, including an appropriate period of satisfactory overseas employment with the American Institute in Taiwan.'

"Sec. 7. This order shall be effective September 30, 1997.".

Continuance of certain Federal advisory committees. Ex. Or. No. 13138 of Sept. 30, 1999, *64 Fed. Reg. 53879;* Ex. Or. No. 13225 of Sept. 28, 2001, *66 Fed. Reg. 50291;* Ex. Or. No. 13226 of Sept. 30, 2001, *66 Fed. Reg. 50524,* provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, and in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), it is hereby ordered as follows:

"Sections 1-4. [Superseded—These sections provided for continuance of certain advisory committees; performance of functions of the President; revocation of certain Executive Orders which established committees that have terminated and whose work is completed; and supersession of Ex. Or. No. 13062.]

"Sec. 5. Executive Order 12131 *[50 USCS Appx § 2401* note], as amended, is further amended by adding in section 1-102(a) a new paragraph as follows: '(9) Department of Energy.'

"Sec. 6. Executive Order 13115 [unclassified] is amended by adding the Department of the Treasury and the Office of National Drug Control Policy to the Interagency Task Force on the Roles and Mission of the United States Coast Guard, so that the list in section 1(b) of that order shall read as follows:

'(1) Department of State;

(2) Department of the Treasury;

(3) Department of Defense;

(4) Department of Justice;

(5) Department of Commerce;

(6) Department of Labor;
(7) Department of Transportation;
(8) Environmental Protection Agency;
(9) Office of Management and Budget;
(10) National Security Council;
(11) Office of National Drug Control Policy;
(12) Council on Environmental Quality;
(13) Office of Cabinet Affairs;
(14) National Economic Council;
(15) Domestic Policy Council; and
(16) United States Coast Guard.'

"Sec. 7. Executive Order 12367 [unclassified], as amended, is further amended as follows:

"(a) in section 1, the text 'the director of the International Communication Agency,' is deleted;

"(b) in section 2, delete the first sentence and insert in lieu thereof 'The Committee shall advise, provide recommendations to, and assist the President, the National Endowment of the Arts, the National Endowment for the Humanities, and the Institute of Museum and Library Services on matters relating to the arts and the humanities. The Committee shall initiate and assist in the development of (i) ways to promote public understanding and appreciation of the arts and the humanities; (ii) ways to promote private sector support for the arts and humanities; (iii) ways to evaluate the effectiveness of Federal support for the arts and humanities and their relationship with the private sector; (iv) the planning and coordination of appropriate participation (including productions and projects) in major national cultural events, including the Millennium; (v) activities that incorporate the arts and the humanities in government objectives; and (vi) ways to promote the recognition of excellence in the fields of the arts and the humanities.'; and

"(c) in section 3(b), add the following sentence after the first sentence: 'Private funds accepted under the National Endowment for the Arts' or the National Endowment for the Humanities' gift authority may also be used to pay expenses of the Committee.'

"Sec. 8. Executive Order 12345 [*42 USCS § 300u-5* note], as amended, is further amended by deleting the first sentence of section 2(b) and inserting in lieu thereof the following three sentences. 'The council shall be composed of twenty members appointed by the President. Each member shall serve a term of 2 years and may continue to serve after the expiration of their term until a successor is appointed. A member appointed to fill an unexpired term will be appointed for the remainder of such term.'

"Sec. 9. This order shall be effective September 30, 1999.".

Ex. Or. No. 13225 (superseded). Ex. Or. No. 13225 of Sept. 28, 2001, *66 Fed. Reg. 50291,* which formerly appeared as a note to this section, was superseded by Ex. Or. No. 13316 of September 17, 2003, *68 Fed. Reg. 55255.* It provided for continuation of certain Federal advisory committees.

Continuance of certain Federal advisory committees. Ex. Or. No. 13316 of September 17, 2003, *68 Fed. Reg. 55255;* Ex. Or. 13385 of Sept. 29, 2005, *70 Fed. Reg. 57989,* provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, and in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), it is hereby ordered as follows:

"Sections 1, 2. [Superseded—These sections provided for continuance of certain advisory committees and performance of functions of the President.]

"Sec. 3. The following Executive Orders, or sections thereof, which established committees that have terminated or whose work is completed, are revoked:

"(a) Sections 5 through 7 of Executive Order 13111 [*5 USCS § 4103*], as amended by Executive Order 13188 and Section 3(a) of Executive Order 13218, pertaining to the establishment of the Advisory Committee on Expanding Training Opportunities;

"(b) Executive Order 12975 [*42 USCS § 6601* note], as amended by Executive Orders 13018, 13046, and 13137, establishing the National Bioethics Advisory Commission;

"(c) Executive Order 13227 [unclassified], as amended by Executive Order 13255, establishing the President's Commission on Excellence in Special Education;

"(d) Executive Order 13278 [unclassified], establishing the President's Commission on the United States Postal Service;

"(e) Executive Order 13210 [unclassified], establishing the President's Commission to Strengthen Social Security;

"(f) Sections 5 through 8 of Executive Order 13177 [*50 USCS Appx § 2099* note], pertaining to the establishment of the President's Council on the Use of Offsets in Commercial Trade;

"(g) Executive Order 13263 [*42 USCS § 290bb-3* note], establishing the President's New Freedom Commission on Mental Health;

"(h) Executive Order 13214 [*38 USCS § 8111* note], establishing the President's Task Force to Improve Health Care Delivery for Our Nation's Veterans; and

"(i) Executive Order 13147 [*42 USCS § 287c-21* note], as amended by Executive Order 13167, establishing the White House Commission on Complementary and Alternative Medicine Policy.

"Sec. 4. Executive Order 13225 is superseded [note to this section].

"Sec. 5. [Omitted—This section amended Ex. Or. 12131 *(50 USCS Appx § 2401* note).]

"Sec. 6. This order shall be effective September 30, 2003.".

Continuance of certain Federal advisory committees and amendments to and revocation of other executive orders. Ex. Or. No. 13385 of Sept. 29, 2005, *70 Fed. Reg. 57989,* provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, and consistent with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), it is hereby ordered as follows:

"Section 1. Each advisory committee listed below is continued until September 30, 2007.

"(a) Committee for the Preservation of the White House; Executive Order 11145 [*3 USCS § 110* note], as amended (Department of the Interior).

"(b) National Infrastructure Advisory Council; section 3 of Executive Order 13231 [*6 USCS § 121* note], as amended (Department of Homeland Security).

"(c) Federal Advisory Council on Occupational Safety and Health; Executive Order 12196 [*5 USCS § 7902* note], as amended (Department of Labor).

"(d) President's Board of Advisors on Historically Black Colleges and Universities; Executive Order 13256 [*20 USCS § 1060* note] (Department of Education).

"(e) President's Board of Advisors on Tribal Colleges and Universities; Executive Order 13270 [*25 USCS § 1801* note] (Department of Education).

"(f) President's Commission on White House Fellowships; Executive Order 11183 [unclassified], as amended (Office of Personnel Management).

"(g) President's Committee for People with Intellectual Disabilities; Executive Order 12994 [*42 USCS § 15001* note], as amended (Department of Health and Human Services).

"(h) President's Committee on the Arts and the Humanities; Executive Order 12367 [unclassified], as amended (National Endowment for the Arts).

"(i) President's Committee on the International Labor Organization; Executive Order 12216 [*22 USCS § 271* note], as amended (Department of Labor).

"(j) President's Committee on the National Medal of Science; Executive Order 11287 [*42 USCS § 1881* note], as amended (National Science Foundation).

"(k) President's Council of Advisors on Science and Technology; Executive Order 13226 [*42 USCS § 6601* note], as amended (Office of Science and Technology Policy).

"(l) President's Council on Bioethics; Executive Order 13237 [*42 USCS § 6601* note] (Department of Health and Human Services).

"(m) President's Council on Physical Fitness and Sports; Executive Order 13265 [*42 USCS § 300u* note] (Department of Health and Human Services).

"(n) President's Export Council; Executive Order 12131 *[50 USCS Appx § 2401* note], as amended (Department of Commerce).

"(o) President's National Security Telecommunications Advisory Committee; Executive Order 12382 [unclassified], as amended (Department of Homeland Security).

"(p) Trade and Environment Policy Advisory Committee; Executive Order 12905 [*19 USCS § 2155* note] (Office of the United States Trade Representative).

"Sec. 2. Notwithstanding the provisions of any other Executive Order, the functions of the President under the Federal Advisory Committee Act [5 USCS Appx] that are applicable to the committees listed in section 1 of this order shall be performed by the head of the department or agency designated after each committee, in accordance with the guidelines and procedures established by the Administrator of General Services.

"Sec. 3. The following Executive Orders that established committees that have terminated or whose work is completed are revoked:

"(a) Executive Order 13328 [*50 USCS § 2301* note], establishing the Commission on the Intelligence Capabilities of the

United States Regarding Weapons of Mass Destruction; and

"(b) Executive Order 13326 [unclassified], establishing the President's Commission on Implementation of United States Space Exploration Policy.

"Sec. 4. Sections 1 and 2 of Executive Order 13316 [note to this section] are superseded by sections 1 and 2 of this order.

"Sec. 5. [Omitted—This section amended Ex. Or. 13231 (*6 USCS § 121* note).]

"Sec. 6. [Omitted—This section amended Ex. Or. 12367 (unclassified).]

"Sec. 7. [Omitted—This section amended Ex. Or. 12216 (*22 USCS § 271* note).]

"Sec. 8. [Omitted—This section amended Ex. Or. 13226 (*42 USCS § 6601* note).]

"Sec. 9. Executive Order 13283 *[3 USCS prec § 101* note] is revoked.

"Sec. 10. This order shall be effective September 30, 2005.".

NOTES:

Related Statutes & Rules:

This section is referred to in *5 USCS § 8473*; *7 USCS §§ 5843, 5853*; *12 USCS § 4703*; *15 USCS § 4603*; *16 USCS §§ 1a-14, 410nn-3, 410oo-5, 410qq-2, 410ww-21, 430g-8, 460ww-5, 460kkk, 460lll-22, 463, 698u-5, 1274, 5404*; *20 USCS § 5508*; *21 USCS §§ 360c, 360j*; *29 USCS §§ 765, 1142, 2911*; *33 USCS § 2251*; *38 USCS § 545*; *42 USCS §§ 218, 254j, 299c, 299c-1, 300d-1, 300j-5, 300v-3, 2471a, 11221, 12623*, 12653l, *13458, 14131*; *44 USCS § 2701*; *49 USCS §§ 30306, 44508.*

Research Guide:

Am Jur:

77 Am Jur 2d, United States § 29.

Annotations:

Construction and application of Taylor Grazing Act (*43 USCS §§ 315* et seq.). *42 ALR Fed 353.*

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2* §§ 1-15 *[5 USCS Appx §§ 1-15]*). *160 ALR Fed 483.*

Law Review Articles:

Tuerkheimer. Veto by Neglect: The Federal Advisory Committee Act. *25 Am U L Rev 53, 1975.*

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

Perritt; Wilkinson. Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years. *63 Geo L J 725, 1975.*

The Federal Advisory Committee Act. *10 Harv J Legis 217, 1973.*

Interpretive Notes and Decisions:

1. Generally. 2. Purpose. 3. Termination of particular committees

1. Generally

Federal Advisory Committee Act was intended to have both immediate effect, through FACA § 14, and prospective effect, through §§ 5, 6 and 7, in providing means by which advisory committees could be reviewed so that those no longer furthering purpose for which they were established could be terminated. *Carpenter v Morton (1976, DC Nev) 424 F Supp 603.*

Decision of whether advisory committee, terminated by FACA § 14, should be re-established is discretionary with particular administrative agency and cannot be reviewed by district court. *Hiatt Grain & Feed, Inc. v Bergland (1978, DC Kan) 446 F Supp 457, 11 Envt Rep Cas 1961,* affd (1979, CA10 Kan) *602 F2d 929,* cert den *(1980) 444 US 1073, 62 L Ed 2d 755, 100 S Ct 1019.*

2. Purpose

It is clear that when Congress enacted Federal Advisory Committee Act, it was concerned about proliferation of advisory committees which had outlived their usefulness; to remedy situation, Congress in FACA § 14 chose to terminate

all advisory committees and in doing so contemplated that Act would affect existing substantive law and that if it later decided advisory committees were necessary, Congress would enact legislation to recharter them. *Carpenter v Morton (1976, DC Nev) 424 F Supp 603.*

3. Termination of particular committees

FACA § 14 terminated all Boards of Grazing District Advisers which were established under authority of *43 USCS §§ 315* et seq. *Carpenter v Morton (1976, DC Nev) 424 F Supp 603.*

15 of 16 DOCUMENTS

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 15

§ 15. Requirements relating to the National Academy of Sciences and the National Academy of Public Administration

(a) In general. An agency may not use any advice or recommendation provided by the National Academy of Sciences or National Academy of Public Administration that was developed by use of a committee created by that academy under an agreement with an agency, unless—

(1) the committee was not subject to any actual management or control by an agency or an officer of the Federal Government;

(2) in the case of a committee created after the date of the enactment of the Federal Advisory Committee Act Amendments of 1997 [enacted Dec. 17, 1997], the membership of the committee was appointed in accordance with the requirements described in subsection (b)(1); and

(3) in developing the advice or recommendation, the academy complied with—

(A) subsection (b)(2) through (6), in the case of any advice or recommendation provided by the National Academy of Sciences; or

(B) subsection (b)(2) and (5), in the case of any advice or recommendation provided by the National Academy of Public Administration.

(b) Requirements. The requirements referred to in subsection (a) are as follows:

(1) The Academy shall determine and provide public notice of the names and brief biographies of individuals that the Academy appoints or intends to appoint to serve on the committee. The Academy shall determine and provide a reasonable opportunity for the public to comment on such appointments before they are made or, if the Academy determines such prior comment is not practicable, in the period immediately following the appointments. The Academy shall make its best efforts to ensure that (A) no individual appointed to serve on the committee has a conflict of interest that is relevant to the functions to be performed, unless such conflict is promptly and publicly disclosed and the Academy determines that the conflict is unavoidable, (B) the committee membership is fairly balanced as determined by the Academy to be appropriate

for the functions to be performed, and (C) the final report of the Academy will be the result of the Academy's independent judgment. The Academy shall require that individuals that the Academy appoints or intends to appoint to serve on the committee inform the Academy of the individual's conflicts of interest that are relevant to the functions to be performed.

(2) The Academy shall determine and provide public notice of committee meetings that will be open to the public.

(3) The Academy shall ensure that meetings of the committee to gather data from individuals who are not officials, agents, or employees of the Academy are open to the public, unless the Academy determines that a meeting would disclose matters described in *section 552(b) of title 5, United States Code*. The Academy shall make available to the public, at reasonable charge if appropriate, written materials presented to the committee by individuals who are not officials, agents, or employees of the Academy, unless the Academy determines that making material available would disclose matters described in that section.

(4) The Academy shall make available to the public as soon as practicable, at reasonable charge if appropriate, a brief summary of any committee meeting that is not a data gathering meeting, unless the Academy determines that the summary would disclose matters described in *section 552(b) of title 5, United States Code*. The summary shall identify the committee members present, the topics discussed, materials made available to the committee, and such other matters that the Academy determines should be included.

(5) The Academy shall make available to the public its final report, at reasonable charge if appropriate, unless the Academy determines that the report would disclose matters described in *section 552(b) of title 5, United States Code*. If the Academy determines that the report would disclose matters described in that section, the Academy shall make public an abbreviated version of the report that does not disclose those matters.

(6) After publication of the final report, the Academy shall make publicly available the names of the principal reviewers who reviewed the report in draft form and who are not officials, agents, or employees of the Academy.

(c) Regulations. The Administrator of General Services may issue regulations implementing this section.

HISTORY:

(Oct. 6, 1972, P.L. 92-463, § 15, as added Dec. 17, 1997, P.L. 105-153, § 2(b), 111 Stat. 2689.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Redesignation:

Another § 15 of Act Oct. 6, 1972, P.L. 92-463, was redesignated § 16 of such Act by Act Dec. 17, 1997, P.L. 105-153, § 2(b), 111 Stat. 2689, and now appears as *5 USCS Appx § 16*.

Other provisions:

Report on implementation and compliance. Act Dec. 17, 1997, P.L. 105-153, § 3, 111 Stat. 2691, provides: "Not later than 1 year after the date of the enactment of this Act, the Administrator of General Services shall submit a report to the Congress on the implementation of and compliance with the amendments made by this Act [amending § 3 of the Federal Advisory Committee Act, redesignating § 15 as § 16, and adding a new § 15].".

NOTES:

Research Guide:

Annotations:

Construction and application of Federal Advisory Committee Act *(5 U.S.C.A. App. 2 §§ 1-15 [5 USCS App. 2 §§ 1-15]). 160 ALR Fed 483.*

Law Review Articles:

Kello. Drawing the curtain on open government? In defense of the Federal Advisory Committee Act. *69 Brook L Rev 345.*

*** CURRENT THROUGH P.L. 109-242, APPROVED 7/19/2006 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
TITLE 5—APPENDIX
FEDERAL ADVISORY COMMITTEE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

5 USCS Appx § 16

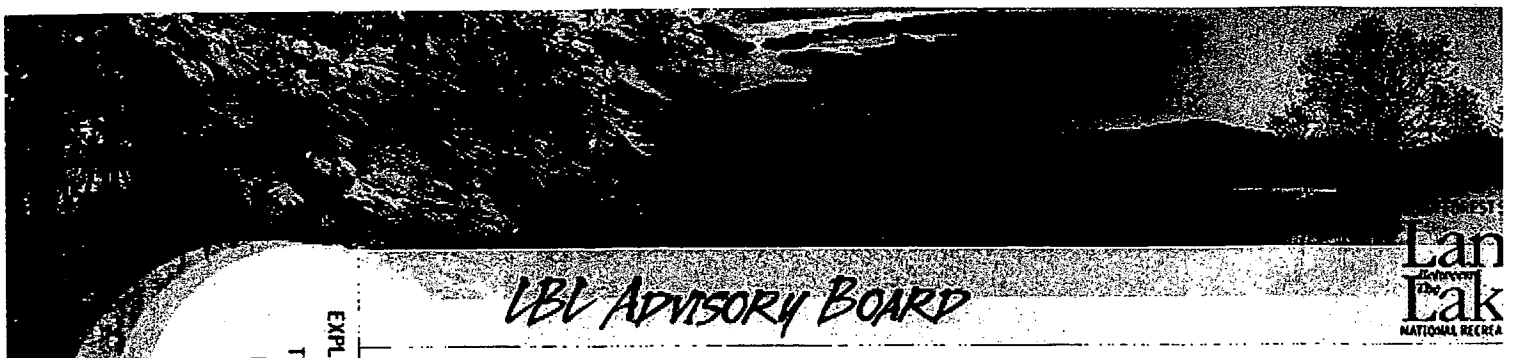
§ 16. Effective date

Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following the date of enactment [enacted Oct. 6, 1972].

HISTORY:
(Oct. 6, 1972, P.L. 92-463, § 16 [15], 86 Stat. 777.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Redesignation:
This section, enacted as § 15 of Act Oct. 6, 1972, P.L. 92-463, was redesignated § 16 of such Act by Act Act Dec. 17, 1997, P.L. 105-153, § 2(b), 111 Stat. 2689.



UNITED STATES DEPARTMENT OF AGRICULTURE
LAND BETWEEN THE LAKES (LBL) ADVISORY BOARD

Bylaws & Operating Procedures

June 1, 2005

SECTION I: PURPOSE

The purpose of the LBL Advisory Board (Board) is to provide advice to the Secretary of Agriculture (Secretary) on the following:

- Means of promoting public participation for the land and resource management plan for LBL
- Environmental education.

SECTION II: AUTHORITY

A. The Secretary, in accordance with Section 522 of the LBL Protection Act, established the LBL Advisory Board. The Board is subject to the Federal Advisory Committee Act (FACA), as outlined in the amended LBL Protection Act and the current Advisory Board Charter, as filed with Congress.

B. For the purposes of National Forest System Land and Resource Management Planning under the provisions of CFR 219.19(a), November 9, 2000, this Board may be utilized as the committee that the Responsible Official (Regional Forester or Area Supervisor) may use for access to knowledge of local conditions and issues in the Forest Service planning process.

SECTION III: MEMBERSHIP SELECTION AND APPOINTMENT

Members of the Board are appointed by the Secretary and seven state and local public officials from Kentucky and Tennessee as described in the Charter. Each member shall serve without compensation and shall not be considered an employee of the United States Department of Agriculture. Appointments will be for five years.

When vacancies occur in a primary membership, the applicable appointing official will be asked to appoint a new primary member to the Board. The designated alternate will fill in as the official representative of their appointing agency until a new primary member is appointed. If an alternate is no longer able to serve, or is appointed to the primary membership, the applicable appointing official will be asked to designate a new alternate.

Appointments are final when notification of the appointment is received by the DFO from the appointing agency. Primary members will officially begin their five-year term at the fall meeting in the year of their appointment. Alternates who move up to a primary membership will officially begin their five-year term as a primary member at

the fall meeting in the year of their appointment.

Members may not succeed themselves as primary members on the Board; however, they may be appointed to additional terms so long as no individual serves more than five consecutive years as a member of the Board. Alternates do not have a term, so there is no limit to the amount of time they may serve in that capacity. They do, however, serve at the pleasure of their appointing agency.

Membership includes the responsibility to personally attend Board meetings, and members will be expected to show commitment to the board by their attendance. If a Board member misses three consecutive meetings, the Chair may recommend their termination as a Board member to the appointing official.

Members will notify the DFO at least 2 weeks in advance if they are unable to attend a meeting so that the alternate member may be contacted. Approved alternates will have full voting rights in the absence of primary members.

SECTION IV: MEETING PROCEDURES

The Board will meet at least twice each year; however, additional meetings may be held as needed. Meetings will be called by the Board Chairperson (Chairperson) with the concurrence of the Designated Federal Official (DFO), in accordance with the following considerations:

A. Quorum and Voting

The Charter requires that nine voting members constitute a quorum for the conduct of business. Any Board recommendation to the Secretary requires an affirmative vote of at least a majority of the total Board membership on that date. Consensus on decisions and recommendations is desirable.

B. Agenda

The DFO will initiate and approve the agenda for all meetings in consultation with the Chairperson. Any member of the Board may submit items for the agenda to the DFO and/or Chairperson. Also, items may be suggested by members of the public to the Board for consideration as agenda items at future meetings. All proposed agenda items must directly relate to the purpose of the Board as described in Section I. Copies of the agenda will be distributed to the members prior to each meeting, and an outline of the agenda will be published with the notice of the meeting in the Federal Register. Meeting agendas will also be available at the LBL Administrative Office and on the LBL web page.

C. Minutes and Records

The DFO will prepare minutes of each meeting, submit them to the Chairperson for certification, and distribute copies to each Board member within 30 working days of the meeting date. Minutes will also be available for review at the LBL Administrative Office and will be accessible on the LBL web page. The minutes will include a record of the members and Forest Service staff present and the names of members of the public requested to make an oral presentation, if applicable; a complete and accurate description of the matters discussed and conclusions reached; and copies of all reports received, issued, or approved by the Board. Additionally, a cumulative listing of Board recommendations will be maintained by the DFO. The listing of Board recommendations and the meeting minutes will be available to the public upon request.

All documents, reports, or other materials prepared by, or for, the Board constitute official government records and will be maintained according to USDA and FACA policies and procedures.

D. Meeting Access

Meeting Access All meetings of the Board will be open to the public for the duration of the meeting. All materials brought before or presented to the Board during the conduct of an open meeting, including minutes of the proceedings, will be available to the public for review, subsequent to the meeting, at the LBL Administrative Office.

Written statements from the public may be submitted to the Board at any time through the DFO; however, written statements received less than 1 week prior to the meeting will not be available to the members until after the meeting.

Time will be reserved on the agenda at each meeting for Board members to discuss comments received prior to that meeting from members of the public. If the individual submitting the comment is present at the meeting, the Board may ask questions for clarification while the comment is being reviewed. This will be an informal question/answer session and time allotted will be limited. Responses will be included in the meeting notes. If a comment received falls within the two purposes of the Board, and if the Board determines that more detailed clarification is required, a time will be scheduled on the agenda at an upcoming Advisory Board meeting for the individual to provide more detailed oral clarification, pertaining to the original comment received by the Board. The individual will be required to provide a written copy of the presentation, and any handouts they will use, to the DFO two (2) weeks prior to the meeting date so copies can be sent to Board Members for their review before the meeting. Time allotted for the detailed oral clarification will be limited. All oral comments from the public, during initial clarification or further detailed clarification if requested by the Board, will be considered as information for the Board. The Chairperson will determine the extent to which the Board will respond to the statements during the meeting, and also the time allotted for clarification.

The meeting announcement published in the Federal Register and made available to public media will note if an oral clarification from a member of the public is scheduled during the meeting.

SECTION V: ROLE OF BOARD OFFICIALS — Executive Board

Chairperson:
The Regional Forester of the Southern Region, USDA Forest Service, serves as the Chairperson. The Deputy Regional Forester serves as the alternate Chairperson. The Chairperson is a non-voting member who works with the DFO to establish priorities, identify issues that must be addressed, and determine the level and types of staff and financial support required. The Chairperson calls meetings with the concurrence of the DFO, conducts meetings, certifies the accuracy of meeting minutes, and is responsible for notifying the public before a meeting occurs. A notice of the upcoming meeting will be placed in the Federal Register 15 calendar days prior to the meeting date and notices will also be distributed through local media 2 weeks prior to the meeting. A meeting facilitator may be employed to assist the Chairperson in conducting meetings. The Chairperson may adjourn meetings with approval of the majority of members present. The alternate Chairperson will accomplish all duties of the Chairperson in his/her absence.

Designated Federal Officer:
The LBL Area Supervisor serves as the Designated Federal Officer (DFO). The Acting Area Supervisor serves as the alternate DFO. The DFO, or the alternate DFO, serves as the government's agent for all matters related to the Board's activities. By law, the DFO must: (1) approve or call meetings of the Board; (2) approve agendas; and (3) attend all meetings. The DFO shall adjourn meetings when such adjournment is in the public interest. The alternate DFO will accomplish all duties of the Designated Federal Officer in his/her absence.

The DFO is responsible for providing adequate staff support to the Board, including: (1) notifying members of the time and place of each meeting; (2) maintaining records of all meetings, including subgroup or working group activities, as required by law; (3) maintaining the roll; (4) preparing the minutes of all meetings of the Board's

deliberations, including subgroup and working group activities; (5) attending to official correspondence; (6) maintaining official Board records and filing all papers and submissions prepared for or by the Board, including items generated by subgroups and working groups; (7) acting as the Board's agent to collect, validate, and pay all vouchers for pre-approved expenditures; and (8) preparing and handling all reports, including the annual report as required by FACA.

SECTION VI. EXPENSES AND REIMBURSEMENT

Expenses related to the operation of the Board will be borne by USDA. Expenditures of any kind must be approved in advance by the DFO.

USDA will pay travel and per diem for Board members at a rate equivalent to that allowable for USDA employees. Members will be required to submit a travel voucher to the DFO with required receipts for out-of-pocket travel and per diem expenses attached. Alternate members will be reimbursed for travel expenses only when they attend an Advisory Board meeting as the official representative of their appointing agency in the absence of the primary member. Completed and signed travel vouchers for expenses should be submitted to the DFO within 30 days after each meeting.

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

Westlaw Attached Printing Summary Report for NEDZAR,TAMAR 5886687

Date/Time of Request:	Tuesday, April 24, 2007 13:59:00 Central
Client Identifier:	TAMAR
Database:	ALLFEDS
Citation Text:	Slip Copy
Lines:	2371
Documents:	1
Images:	0

C

Pennsylvania Dept. of Public Welfare v. U.S.
W.D.Pa.,2006.
Only the Westlaw citation is currently available.

United States District Court,W.D. Pennsylvania.

COMMONWEALTH OF PA DEPT OF PUBLIC WELFARE, Plaintiff,

v.

UNITED STATES, U.S. Dept of Health & Human Services, Defendants.

No. CIVA 05-1285.

Dec. 21, 2006.

Jason W. Manne, Department of Public Welfare Office of General Counsel, Pittsburgh, PA, for Plaintiff.
Lee J. Karl, United States Attorney's Office, Pittsburgh, PA, for Defendants.

MEMORANDUM ORDER

AMBROSE, Chief District J.

***1** The above captioned complaint was received by the Clerk of Court on September 16, 2005, and was referred to United States Magistrate Judge Lisa Pupo Lenihan for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation (Doc. No. 22), filed on November 22, 2006, recommended that Defendants' Motion for Summary Judgment (Doc. No. 8) be granted with regard to the issue of the adequacy of the FOIA search, but denied without prejudice in all other respects. The Report and Recommendation further recommended that Plaintiff's Rule 56(f) Motion (Doc. No. 13) be denied without prejudice on the issue of the adequacy of the FOIA search, but granted on the remaining issues. Service was made on all counsel of record. Plaintiff filed timely Objections to the Report and Recommendation (Doc. No. 23) on December 1, 2006, to which Defendants filed a timely response on December 12, 2006 (Doc. No. 26). Defendants filed timely Objections to the Report and Recommendation on December 6, 2006 (Doc. No. 24), to which Plaintiff filed a timely response on December 18, 2006 (Doc. No. 28). After review of the pleadings and documents in the case, together with the Report and Recommendation and the objections thereto, the following order is entered:

AND NOW, this 21st day of December, 2006,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (Doc. No. 8) is GRANTED IN PART AND DENIED IN PART. Defendants' Motion for Summary Judgment is GRANTED WITH PREJUDICE as to the adequacy of the FOIA search, and DENIED WITHOUT PREJUDICE in all other respects.

IT IS FURTHER ORDERED that Plaintiff's Rule 56(f) Motion (Doc. No. 13) is GRANTED IN PART AND DENIED IN PART. Plaintiff's Rule 56(f) Motion is DENIED WITH PREJUDICE on the issue of the adequacy of the FOIA search, and GRANTED on the remaining issues. Plaintiff is entitled to limited discovery on the remaining issues, the parameters of which shall be set by the Magistrate Judge.

IT IS FURTHER ORDERED that the Report and Recommendation (Doc. No. 22) of Magistrate Judge Lenihan, dated November 22, 2006, is adopted as the opinion of the Court.

REPORT AND RECOMMENDATION

I. *RECOMMENDATION*

It is respectfully recommended that Defendants' Motion for Summary Judgment (Doc. No. 8) be granted with regard to the issue of the adequacy of the search, and denied without prejudice in all other respects. It is further recommended that Plaintiff's Rule 56(f) Motion (Doc. No. 13) be denied with prejudice on the issue of the adequacy of the search, and granted on the remaining issues.

II. *REPORT*

Plaintiff, the Commonwealth of Pennsylvania Department of Public Welfare ("Commonwealth"), instituted this action pursuant to the Freedom of In-

formation Act ("FOIA"), 5 U.S.C. § 552, to compel the United States and its Department of Health and Human Services ("HHS") to disclose certain documents relating generally to audits conducted by HHS's Office of Inspector General ("OIG") and, specifically, to the review of Title IV-E foster care programs. The Commonwealth made five separate requests pursuant to FOIA between June 29, 2005 and July 19, 2005 for specific materials in these categories. All told, HHS has released approximately 925 pages of responsive materials to the Commonwealth, including pages with redactions, and has withheld in their entirety approximately 202 pages of responsive materials, claiming the withheld materials are exempt from disclosure under 5 U.S.C. § 552(b)(5) ("Exemption (b)(5)"). The Commonwealth disputes the applicability of Exemption (b)(5) to approximately 196 pages of responsive materials withheld by HHS, and also challenges the adequacy of the search conducted by HHS, as well as HHS's representation that it has released all responsive and reasonably segregable factual information. This Court has original subject matter jurisdiction over the action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

***2** HHS has filed a Motion for Summary Judgment (Doc. No. 8), based on its *Vaughn* indices and supporting declarations. In response, the Commonwealth has filed a brief and supplemental brief in opposition, supporting affidavit, and a Rule 56(f) Motion for Discovery (Doc. No. 13). For the reasons set forth below, the Court recommends that Defendants' motion for summary judgment be granted in part and denied in part, and that Plaintiff's Rule 56(f) Motion for Discovery be granted with limitations.

A. *Standard of Review-Motion for Summary Judgment*

The summary judgment standard of Fed.R.Civ.P. 56(c) applies to FOIA cases as it would to any other civil action. *Commw. of PA., Dep't of Public Welfare v. United States Dep't of Health & Human Serv.*, 623 F.Supp. 301, 303 (M.D.Pa.1985). Summary judgment is appropriate if, drawing all inferences in favor of the nonmoving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

More specifically, the moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a *genuine issue for trial*" or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis added by *Matsushita* Court). An issue is genuine only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In order to prevail on a motion for summary judgment in a FOIA action, the government agency must show that there are no disputed material facts and that each page of material that falls within the requested category either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 833 (D.C.Cir.2001) (citations omitted); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C.Cir.1980) (citation omitted). As to the second part of its burden, the agency must demonstrate that its search was adequate and that any withheld documents fall within one of the FOIA exemptions. *Lee v. U.S. Dep't of Justice*, 235 F.R.D. 274, 287 (W.D.Pa.2006) (citing 5 U.S.C. § 552(a)(4)(B); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.1994)). As the possessor of the records and the party responsible for conducting the search, the agency may satisfy this burden by filing a " 'reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were

searched." ' *Id.* (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C.Cir.1999); citing *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 552 (D.C.Cir.1994)). In addition, the affidavits or declarations must aver facts showing that the agency has conducted a thorough search and provide reasonably detailed explanations as to why any withheld documents fall within the claimed exemption. *Id.* (citing *Carney*, 19 F.3d at 812; *Maynard v. Cent. Intelligence Agency*, 986 F.2d 547, 559-60 (1st Cir.1993); *Perry v. Block*, 684 F.2d 121, 126-27 (D.C.Cir.1982)). Affidavits or declarations which satisfy this burden are to be given a presumption of good faith by the district court. *Id.* (citing *SafeCard Servs., Inc. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C.Cir.1991)). Thus, courts have granted summary judgment in favor of the agency when the agency's affidavits " 'describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption ..., and are not controverted by either contrary evidence in the record nor [sic] by evidence of agency bad faith." ' *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1050 (3d Cir.1995) (quoting *Am. Friends Serv. Comm'n v. Dep't of Defense*, 831 F.2d 441, 444 (3d Cir.1987)) (other citation omitted).

***3** "[D]iscovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary so long as the agency's submissions are facially adequate." *Id.* (citing *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 352 (D.C.Cir.1978)). If the agency's submissions are determined to be facially adequate, the district court may refuse discovery and award summary judgment based on the affidavits. *Id.* (citing *Goland, supra*). If, however, a review of the record raises substantial doubt, especially where the requests are "well-defined" and the complainant submits positive indications of overlooked materials, summary judgment is inappropriate. *Id.* (citing *Valencia-Lucena*, 180 F.3d at 326; *Founding Church of Scientology of Washington, D.C., Inc., v. Nat'l Sec. Agency*, 610 F.2d 824, 830 (D.C.Cir.(1979)).

B. *Statement of Relevant Facts and Procedural History*

On June 29, 2005, the Commonwealth sent the first of five FOIA requests to HHS requesting interagency agreements between OIG and Administration for Children and Families ("ACF"), and between OIG and the Centers for Medicare and Medicaid Programs ("CMS") regarding the performance of audits for these programs; all OIG statistical sampling policies; and contract documents relating to OIG's use of the Teammate working paper software.[FN1] (Ex. A to Pl.'s Compl.) On that same date, the Commonwealth sent a second FOIA request to HHS requesting all documents evidencing or discussing any agreement between ACF or its Regional Administrator, David Lett, and OIG relating to review of Pennsylvania's Title IV-E claims for any periods of time between 1997 and 2002.[FN2] (Ex. B to Pl.'s Compl.)

FN1. HHS assigned Case No.2005-0952-FW to the Commonwealth's first FOIA request. *See Declaration of Katherine Hooten* dated 1/13/06 (attached as Ex. D to Mem. of Law in Supp. of Defs.' Motion for Summ. J.) ("Hooten Decl. I") at ¶ 5.

FN2. HHS assigned Case No.2005-0951 - MB to the Commonwealth's second FOIA request. *See Hooten Decl. I* at ¶ 7.

On June 30, 2005, the Commonwealth submitted its third FOIA request to HHS requesting documents relating to all child eligibility review instruments used by OIG auditors in ongoing or completed audits of Title IV-E maintenance payments made by states and local governments.[FN3] (Ex. C to Pl.'s Compl.) Also on June 30, 2005, the Commonwealth sent a fourth FOIA request to HHS requesting any letters to state officials after January 1, 2000 announcing the initiation of an audit by OIG relative to a state Title IV-E program except for completed audits whose reports were posted on the HHS web-site or, alternatively, a letter listing the ongoing Title IV-E audits.[FN4] (Ex. D to Pl.'s Compl.)

FN3. HHS assigned Case No.2005-0953-RE to the Commonwealth's third FOIA request. *See Declation of Diane J. Diggs* dated 12/7/05 (attached as Ex. E to Mem. of Law

in Supp. of Defs.' Motion for Summ. J.) ("*Diggs Decl.*") at ¶ 9.

FN4. HHS assigned Case No.2005-0954-mb to the Commonwealth's fourth FOIA request. *See Diggs Decl.* at ¶ 11.

Finally, on July 19, 2005, the Commonwealth sent its fifth FOIA request to HHS requesting all documents post 1997 relating to decisions by ACF and OIG to subject Pennsylvania's Title IV-E program to audit by OIG, discussions held by the staff of ACF, including ACF Regional Administrator David Lett, or OIG staff relative to whether Pennsylvania's Title IV-E program should be audited by OIG, and the decision by OIG to include a cost analysis of Title IV-E provider rates in its audit of Pennsylvania's Title IV-E program.[FN5] (Ex. E to Pl.'s Compl.) In this request, the Commonwealth specifically sought the release of segregable factual material contained in privileged documents.[FN6] (*Id.*)

FN5. HHS assigned Case No.2005-1000-RE to the Commonwealth's fifth FOIA request. *See Diggs Decl.* at ¶ 12.

FN6. Although the FOIA requestor's purpose for requesting the information is irrelevant, the Court notes that the majority of the information sought in the five FOIA requests here appears to be related to claims asserted by the Commonwealth in a separate lawsuit filed in this judicial district at Civil Action No. 05-1345, under the caption, "*Commonwealth of Pennsylvania Department of Public Welfare v. United States, United States Department of Health and Human Services.*" On September 19, 2006, judgment was entered in favor of defendants in the case filed at 05-1345. The Commonwealth has appealed the judgment in Civil Action No. 05-1345 to the U.S. Court of Appeals for the Third Circuit by filing a notice of appeal on September 22, 2006.

***4** Other than acknowledging receipt of the FOIA requests and denying the Commonwealth's requests for a fee waiver, HHS did not respond to the document requests within the time required by law. (Compl. ¶ 6 .) Therefore, while HHS was processing the five FOIA requests, the Commonwealth instituted the present FOIA action on September 16, 2005.

Subsequently, on October 19, 2005, HHS responded to the Commonwealth's fourth FOIA request (Case No.2005-0954-mb) by producing in its entirety a list of letters announcing the initiation of audits by OIG relating to state Title IV-E programs. (Ex. 6 to *Declaration of Robert Eckert* dated 4/12/06 ("*Eckert Decl. I* ").[FN7]) Thereafter, the parties proposed and the Court approved a case management plan, pursuant to which HHS conducted its search for documents corresponding to the first, second, third, and fifth FOIA requests made respectively in Case Nos.2005-0952-FW, 2005-0951-MB, 2005-0953-RE, and 2005-1000-RE.

FN7. The Declaration of Robert Eckert dated 4/12/06 is attached as Exhibit A to the Memorandum of Law in Support of Defendants' Motion for Summary Judgment (Doc. No. 9).

On January 5, 2006, HHS informed the Commonwealth that after searching its records, it was able to locate approximately 1,128 pages responsive to the Commonwealth's requests and released approximately 830 pages, some of which contained redactions. (Ex. 8 to *Eckert Decl. I.*) In this regard, HHS informed the Commonwealth that employer identification numbers under Exemption (b)(4) [FN8], information documenting the deliberative process under Exemption (b)(5) [FN9], and names and other identifiers of minor children under Exemption (b)(6) [FN10] were redacted from the released documents. (*Id.*) HHS withheld the remaining 298 pages in their entirety based on Exemption (b)(5).[FN11] (*Id.*)

FN8. Exemption (b)(4) allows the agency to withhold "commercial or financial information obtained from a person and privileged or confidential". 5 U.S.C. § 552(b)(4).

FN9. Exemption (b)(5) allows the agency to withhold "inter-agency or intra-agency memorandums or letters which would not be

> available by law to a party other than an agency in litigation with the agency". 5 U.S.C. § 552(b)(5). The courts have recognized that Exemption (b)(5) generally protects from disclosure materials that would be protected under the executive or "deliberative process" privilege, attorney-client privilege, and/or the attorney work product privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C.Cir.1980) (citations omitted).
>
> FN10. Exemption (b)(6) allows the agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". 5 U.S.C. § 552(b)(6).
>
> FN11. HHS informed the Commonwealth that it withheld materials under Exemption (b)(5) based on either the deliberative process, the attorney work-product, and/or the attorney-client privileges. (Ex. 8 to *Eckert Decl. I.*)

HHS produced its *Vaughn* indices FN12 on February 28, 2006 for materials withheld in their entirety and released with redactions in Case Nos.2005-951-MB and 2005-1000-RE (Ex. 9), Case No.2005-0952-FW (Ex. 10), and Case No.2005-953-RE (Ex. 11). (Ex. 9-11 to *Eckert Decl. I;* Ex. C to Mem. of Law in Supp. of Defs.' Mot. for Summ. J.) The *Vaughn* indices provided by HHS identify each material withheld or containing withheld information by providing: (1) the Bate-stamp page number and number of pages, (2) a description of the material, (3) an indication of the amount of information withheld and the length of the document, and (4) the basis for the exemption claimed. According to the *Vaughn* indices submitted by HHS for Case Nos.2005-1000-RE and 2005-951-MB, which are the only *Vaughn* indices at issue here, HHS withheld 202 pages in their entirety,FN13 released with its *Vaughn* indices two (2) pages which had been redacted,FN14 released with its *Vaughn* indices 92 pages in their entirety,FN15 and provided an explanation for 66 pages of previously released materials that had been redacted.FN16

FN12. In *Vaughn v. Rosenn*, 484 F.2d 820 (D.C.Cir.1974) (*Vaughn I*), the Court of Appeals for the District of Columbia Circuit delineated certain information that must be provided by the agency for any documents being withheld under one of the enumerated exemptions under FOIA to satisfy its burden of proof, which has become known as the "*Vaughn* Index".

FN13. HHS alleges that 204 pages of responsive materials were withheld in their entirety; however, the Court, in its review of the *Vaughn* indices, calculated only 202 pages withheld in their entirety. HHS assigned the following Bate-stamp page numbers to these 202 unreleased pages: 490-91, 492-93, 494-95, 497-98, 499, 500-06, 512, 513-16, 517, 518-19, 520, 521-24, 525, 526-28, 529, 530, 531, 532, 533, 537, 538, 539, 542, 545, 546, 556, 584-86, 690-93, 831, 832, 833, 834-35, 836, 837, 838, 839, 84-85, 86, 87-88, 89-90, 91, 92-93, 94-95, 96, 97, 98, 99-100, 101-02, 103, 104-05, 112, 113-14, 115-17, 118, 194-95, 196-97, 198-200, 201-02, 203-04, 205-08, 209-11, 212-15, 217-18, 221-22, 223-24, 227-30, 233-35, 236-37, 238-39, 241, 242, 243, 245, 246-47, 248, 249-50, 251, 252-53, 254-55, 256-57, 258-59, 260-61, 262-64, 265, 266-67, 268, 269, 270-71, 272-73, 274-76, 277-79, 280-84, 285-86, 287-88, 289-91, 292, 343, 344, 345, 346, 465, 466-68, 469, and 470-482.

FN14. These two pages are found at Bate-stamp page nos. 496 and 557.

FN15. The following Bate-stamp page numbers are assigned to these materials: 543-44, 106, 107, 108-09, 110-11, 119-193, 216, 219, 220, 225-26, 231-32, 240, and 244. Although HHS does not indicate in its *Vaughn* indices that page no. 244 was redacted, the Commonwealth contends that page was redacted and it is contesting the withholding of the redacted information.

FN16. The following Bate-stamp page numbers are assigned to these materials: 507-511, 547-55, 699-705, 711-24, 725-43, and 747-58.

In response, on March 28, 2006, the Commonwealth corresponded with HHS and provided a list of withheld documents which correlated to those listed in HHS's *Vaughn* indices for Case Nos.2005-1000-RE and 2005-951-MB, for which it was challenging the specific claimed exemptions. (Ex. B attached to Mem. of Law in Supp. of Defs.' Mot. for Summ. J.) Initially, in its March 28, 2006 correspondence, the Commonwealth challenged HHS's claimed exemptions for 191 pages of responsive materials [FN17] 188 of the challenged pages were withheld in their entirety by HHS; [FN18] the other three (3) pages were redacted and released with the *Vaughn* indices.[FN19] However, a subsequent filing by the Commonwealth on June 2, 2006 (Ex. A to Rule 56(f) Declaration of Jason Manne (Doc. No. 14)) actually places 196 pages in dispute. [FN20] Of these 196 pages, 29 appear to be duplicates of the withheld material.[FN21] On March 28, 2006, the Commonwealth also informed HHS that it was contesting the adequacy of the search and objected to HHS's failure to disclose segregable factual material in the documents. (*Id.*)

FN17. The Commonwealth's March 28, 2006 challenge to the *Vaughn* indices actually lists 193 pages for which the claimed exemptions are disputed. However, that list includes Bate-stamped page nos. 219 and 220, which were released in their entirety by HHS with its *Vaughn* indices. The Commonwealth has subsequently acknowledged receipt of page nos. 00219 and 00220 and withdrawn its challenge to these pages. (Ex. C attached to Mem. of Law in Supp. of Defs.' Mot. for Summ. J.; Pl.'s Br. in Opp'n to HHS's Mot. for Summ. J. and in Supp. of its Rule 56(f) Mot. at 2 n. 2.)

FN18. The 188 pages withheld in their entirety which the Commonwealth is challenging are assigned the following Bate-stamp page numbers: 490-91, 492-93, 494-95, 497-98, 499, 500-06, 512, 513-16, 517, 518-19, 520, 521-24, 526-28, 529, 530, 531, 532, 533, 537, 538, 539, 542, 545, 546, 556, 584-86, 831, 832, 833, 834-35, 836, 837, 838, 839, 84-85, 86, 87-88, 89-90, 91, 92-93, 94-95, 96, 97, 98, 99-100, 101-02, 103, 104-05, 112, 113-14, 115-17, 118, 198-200, 201-02, 203-04, 205-08, 209-11, 212-15, 217-18, 221-22, 223-24, 227-30, 236-37, 241, 242, 243, 245, 246-47, 248, 249-50, 251, 252-53, 254-55, 256-57, 258-59, 260-61, 262-64, 265, 266-67, 268, 269, 270-71, 272-73, 274-76, 277-79, 280-84, 285-86, 287-88, 289-91, 292, 343, 344, 345, 346, 465, 466-68, 469, 470-482.

FN19. The three (3) redacted pages released by HHS and challenged by the Commonwealth are Bate-stamp page nos. 496, 557, and 244. With regard to page no. 244, HHS's *Vaughn* indices do not indicate that this page was redacted in any way.

FN20. In addition to the 191 pages of withheld material challenged on March 28, 2006, the Commonwealth now appears to be challenging the exemptions claimed for eleven (11) other pagesBate-stamp page nos. 216, 225-26, 231-32, 233-35, 238-39, and 240-as indicated in Exhibit A to the Rule 56(f) Declaration of Jason W. Manne (Doc. No. 14). However, six (6) of these pages, *i.e.*, page nos. 216, 225-26, 231-32, and 240, appear to have been released without redaction with HHS's *Vaughn* indices, and the Commonwealth does not provide any basis for including these pages in its June 2, 2006 submission, nor is there any evidence of record to suggest that these documents contain redactions. Therefore, the Court concludes that these six (6) pages were listed in error by the Commonwealth and has not included them as part of the total number of challenged pages.

FN21. The following page numbers appear to be duplicates: Page no. 546 is a duplicate of 545; page nos. 556 and 557 are duplicates of page no. 496; page nos. 584-86, 274-76,

277-79, and 289-91 are duplicates of page nos. 526-28; page no. 836 is a duplicate of page no. 537; page no. 837 is a duplicate of page no. 538; page nos. 838 and 112 are duplicates of page nos. 539; page no. 839 is a duplicate of page no. 542; page nos. 113-14 are duplicates of page nos. 834-35; page nos. 272-73 and 285-86 are duplicates of page nos. 497-98; and page nos. 344, 345, and 346 are duplicates of page no. 343.

***5** On May 3, 2006, HHS filed a Motion for Summary Judgment, brief in support thereof, together with its supporting declarations and documents. In response, the Commonwealth filed a motion to stay the proceedings on HHS's motion for summary judgment pending discovery pursuant to Rule 56(f), along with supporting declaration and brief. The Commonwealth also filed a brief in opposition to HHS's motion for summary judgment which was also included in its brief in support of its Rule 56(f) motion. Both sides filed reply briefs, and pursuant to the order of court dated October 19, 2006, the Commonwealth filed a supplemental brief in opposition to HHS's motion for summary judgment and in support of its Rule 56(f) motion on October 25, 2006. Thus, the pending motions have been fully briefed and are ripe for disposition.

C. *Analysis*

FOIA was enacted by Congress for the purpose of " 'facilitat[ing] public access to Government documents." ' *Davin*, 60 F.3d at 1049 (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991)). Consistent with the purpose of creating an expedient mechanism for disseminating information and holding government agencies accountable, FOIA directs government agencies to promptly produce any requested materials unless that information is exempt from disclosure pursuant to one of the nine exemptions enumerated in the FOIA statute, 5 U.S.C. § 552(b)(1)-(9). *Id.* (citing *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 974 (3d Cir.1981) (quoting S.Rep.No. 813, 89th Cong., 1st Sess. 3 (1965)). Thus, the Supreme Court has held that FOIA "creates a strong presumption in favor of disclosure." *Id.* (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976)). To this end, FOIA mandates that the district court review *de novo* the agency's decision to withhold requested information. *Id.* (citing 5 U.S.C. § 552(a)(4)(B)); *see also McDonnell v. United States*, 4 F.3d 1227, 1241 (3d Cir.1993) (citing § 552(a)(4)(B)). The burden of demonstrating that a particular exemption applies falls squarely on the agency. *Davin*, 60 F.3d at 1049; *McDonnell*, 4 F.3d at 1241. In addition, the statute requires the agency to disclose "[a]ny reasonably segregable portion of a record ... to any person requesting such record after deletion of the portions which are exempt under [section 552(b)]." 5 U.S.C. § 552(b).

Because "the review of FOIA cases is made difficult by the fact that the party seeking disclosure does not know the contents of the information sought and is, therefore, helpless to contradict the government's description of the information or effectively assist the trial judge," the reviewing court generally will require the government agency to prepare a *Vaughn* index and supporting affidavits to ensure a meaningful adversarial process. *Davin*, 60 F.3d at 1049 (citing *Ferri v. Bell*, 645 F.2d 1213, 1222 (3d Cir.1981), *modified* 671 F.2d 769 (3d Cir.1982)); *McDonnell*, 4 F.3d at 1241 (citing *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217-18 (D.C.Cir.1987)). In this regard, the Third Circuit endorsed the following observation of the United States Court of Appeals for the District of Columbia Circuit in *King, supra:*

***6** The significance of agency affidavits in a FOIA case cannot be underestimated. As, ordinarily, the agency alone possesses knowledge of the precise content of documents withheld, the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected. As we observed in *Vaughn v. Rosen*, "[t]his lack of knowledge by the party seeing [*sic*] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution," with the result that "[a]n appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a lower court's factual determination." Even should the court undertake in camera inspection of the material-an unwieldy process where hundreds or thousands of pages

are in dispute"[t]he scope of the inquiry will not have been focused by the adverse parties...."
Affidavits submitted by a governmental agency in justification for its exemption claims must therefore strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation. The detailed public index which in *Vaughn* we required of withholding agencies is intended to do just that: "to permit adequate adversary testing of the agency's claimed right to an exemption," and enable "the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Thus, when an agency seeks to withhold information, it must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply."

McDonnell, 4 F.3d at 1241 (quoting *King*, 830 F.2d at 218-19) (footnotes omitted). The Court of Appeals in *King* further opined:Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review."

830 F.2d at 219 (footnotes omitted).

In the case at bar, HHS has filed its *Vaughn* indices and supporting declarations, identifying what it maintains are all of the materials responsive to the Commonwealth's FOIA requests. HHS submits that its supporting documentation establishes that its search for responsive materials to the Commonwealth's FOIA requests was reasonable, it released all reasonably segregable, non-exempt information, and that it properly withheld the challenged materials under Exemption (b)(5). Accordingly, HHS submits that it is entitled to summary judgment in its favor.

***7** In opposition, the Commonwealth submits that the search affidavits submitted by HHS are deficient on virtually all of the requirements established by the courts for adequate search affidavits and therefore HHS has failed to carry its burden on the adequacy of the search. In addition, the Commonwealth argues that HHS's affidavits are deficient in that they fail to provide any details regarding the process used to determine that all reasonably segregable factual material has been released and/or to explain why the materials withheld are not reasonably segregable. The Commonwealth contends that Bate-stamped number 545 in the *Vaughn* Index evidences bad faith on the part of HHS with regard to its representation that all reasonably segregable material has been released. Finally, the Commonwealth argues that HHS has not met its burden of proof with regard to the claimed exemptions from disclosure, as most of the entries in the *Vaughn* index have the same conclusory, boilerplate language supporting the claimed exemption and little factual detail is supplied to show why a particular exemption applies to particular documents. In light of these infirmities, the Commonwealth contends that HHS's motion for summary judgment should be denied and that it should be allowed to conduct limited discovery to flesh out the deficiencies in the HHS submission and to establish a full record for disposition by the Court.

According to the Commonwealth, the key to resolving HHS's motion for summary judgment is to determine whether the *Vaughn* index and supporting declarations provide an "adequate factual basis" to grant the motion. In order to make this determination, the Commonwealth contends that this Court must answer the following four questions:
1. Do the search affidavits provide an adequate factual basis to establish the reasonableness of the search for documents;
2. Do the *Vaughn* index and affidavits provide an adequate factual basis to show that HHS released all segregable factual material in the withheld documents;
3. Do the *Vaughn* index and affidavits provide an adequate factual basis to establish the claimed exemptions from disclosure in the withheld documents; and
4. If the HHS materials are deficient, is [the Commonwealth] entitled to discovery.

See Pl.'s Br. in Opp'n to HHS' Mot. for Summ. J. and

in Supp. of its Rule 56(f) Mot. (Doc. Nos. 15 & 16). The Commonwealth submits that the answers to the first three questions must be in the negative, and therefore, it is entitled to discovery, *i.e.*, the fourth question must be answered in the affirmative. Each of these arguments is addressed *seriatim* below.

1. Adequacy of Search

Generally, the courts apply a reasonableness standard to determine the adequacy of an agency's search for requested documents, which requires the agency to demonstrate that the search it conducted was "reasonably calculated to uncover all relevant documents." *Moore v. Aspin*, 916 F.Supp. 32, 35 (D.D.C.1996) (citing *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1383 (8th Cir.1985)); *see also Williams v. U.S. Dep't of Justice*, No. 05-2928, 2006 U.S.App. LEXIS 10493, *4 (3d Cir. Apr. 26, 2006) (citing *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C.Cir.1990)) (agency is obligated to conduct a reasonable search for responsive records); *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C.Cir.1994) (citing *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C.Cir.1984)) (adequacy of search is judged by a standard of reasonableness). Stated another way, this standard requires the agency to "show that it made a good faith effort to conduct a search for the requested records, using methods which reasonably can be expected to produce the information requested." *Moore*, 916 F.Supp. at 35 (citing *Oglesby*, 920 F.2d at 68). However, the reasonableness standard does not mandate a detailed examination of every document maintained by the agency or that the agency search every record system. *Id.* Rather, all that is required is that the search be reasonably calculated to reveal the records sought by the requester. *Id.*; *Steinberg*, 23 F.3d at 551.

***8** An agency can satisfy its burden of establishing reasonableness by providing reasonably detailed affidavits, submitted in good faith, "setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched[.]" FN22 *Oglesby*, 920 F.2d at 69; *Steinberg*, 23 F.3d at 551 (citing *Weisberg*, 745 F.2d at 1485); *Miller*, 779 F.2d at 1383 (citing *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 352 (D.C.Cir.1978)); *Williams*, 2006 U.S.App. LEXIS 10493, at *4-5 (citing *Valencia-Lucena*, 180 F.3d at 326). Once the agency has met its burden of showing the search was reasonable, the burden then shifts to the requestor to rebut that evidence by demonstrating that the search was not conducted in good faith. *Miller*, 779 F.2d at 1383 (citing *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C.Cir.1983)). Mere speculation on the requestor's part that uncovered documents may exist will not suffice to rebut the agency's good faith reasonable search. *Steinberg*, 23 F.3d at 552 (citing *Safe-Card Serv.*, 926 F.2d at 1201).

> FN22. An affidavit describing in general how the agency processed the FOIA request does not satisfy the reasonableness standard. *Steinberg*, 23 F.3d at 552-52 (citing *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C.Cir.1980)). The agency affidavits must state which files were searched and by whom, must contain facts showing a systematic approach to document location, thereby providing sufficiently specific information to enable the requestor to challenge the search process engaged in by the agency. *Id.* at 552.

a. Declarations Submitted by HHS

To satisfy its burden of establishing the adequacy of the search, HHS has produced declarations from the following individuals: Robert Eckert, Katherine Hooten, Diane J. Diggs, Frank T. Connors, and Michael S. Marquis. In asking the Court to deny summary judgment on the adequacy of the search, the Commonwealth submits that these declarations fail to describe in the required detail the files that were searched, by whom, the search terms used, and/or the structure of the agencies' filing systems. Therefore, the Commonwealth argues, the declarations do not describe a systematic approach to document location, nor do they provide sufficient factual information to afford it a meaningful opportunity to contest the search and to allow the district court an adequate factual foundation for judicial review. In support of this argument, the Commonwealth relies primarily on

Davin and *Ogelsby, supra,* and on Church of Scientology of California v. IRS, 792 F.2d 146 (D.C.Cir.1986).

On the other hand, HHS contends that its declarations provide sufficient detail regarding the scope and method of the searches conducted, in that the declarants describe the offices to which each request was referred, provide a description of the office, explain why a particular request was referred to a specific office, provide the location of the responsive documents and/or the type of files where the records were maintained. In addition, HHS argues that the declarants also state that all files likely to contain responsive documents were searched. In support of its argument, HHS cites Perry v. Block, 684 F.2d 121 (D.C.Cir.1982), and Judicial Watch, Inc. v. Food & Drug Admin., 407 F.Supp.2d 70 (D.D.C.2005), for the proposition that in responding to FOIA requests, an agency is not required to "set forth with meticulous documentation the details of an epic search for the requested records." Perry, 684 F.2d at 126. Rather, HHS argues that all it is required to do is provide " 'affidavits that explain in reasonable detail and scope the method of the search conducted by the agency." ' Lechliter v. Rumsfeld, No. 05-4381, 182 Fed. Appx. 113, 116, 2006 WL 1506717, at *2 (3d Cir. June 1, 2006) (quoting *Perry, supra*). FN23 Moreover, HHS contends it has disclosed over 900 pages of responsive materials in this case, demonstrating that it searched the appropriate offices, and cites in support thereof, the district court's decision in Commw. of PA. v. U.S. Dep't of Health & Human Serv., 623 F.Supp. 301, 304 (M.D.Pa.1985) (the "1985 case"), which involved a similar FOIA matter. HHS further argues based on the 1985 case, that the Commonwealth in this case has not identified any "blocks of requested information or documents which appear to be missing and which might be discovered by further search of different offices." *Id.* at 304. Accordingly, HHS submits the Commonwealth's arguments lack merit and are insufficient to raise a material question of fact regarding the adequacy of the search.

FN23. In *Lechliter,* the Court of Appeals held that affidavits from employees in the offices determined to be the only ones likely to possess responsive documents, which indicated in detail their methods for filing documents, described the various files that they searched, and certified that they searched all records systems likely to contain responsive material, were sufficiently detailed to establish that the search was adequate and " "reasonably calculated to uncover all relevant documents." ' 182 Fed. Appx. at 115-16, 2006 WL 1506717 at *2 (quoting *Ogelsby,* 920 F.2d at 68).

***9** With these arguments in mind, the Court now turns to a review of the supporting declarations.

Declaration of Robert Eckert FN24

FN24. HHS actually produced two declarations of Robert Eckert: The first one dated April 12, 2006 ("Eckert Decl. I") addresses the search undertaken pursuant to the five FOIA requests submitted by the Commonwealth. The second declaration of Robert Eckert dated June 19, 2006 ("Eckert Decl. II") was submitted in response to the Commonwealth's brief in opposition to HHS's motion for summary judgment, and addresses the segregability issue discussed *infra* in Part 2.

Robert Eckert is the Director of the Freedom of Information/Privacy Acts ("FOI/PA") Division, Office of the Assistant Secretary for Public Affairs, Department of HHS. In essence, Eckert is the Freedom of Information Officer for HHS. (Eckert Decl. I at ¶ 1.) As such, his duties include responding to FOIA requests and determining whether to release or withhold records or portions of records in accordance with FOIA and HHS regulations. (*Id.* at ¶ 2.) Upon receipt of the five FOIA requests submitted by the Commonwealth, Eckert forwarded the requests to various offices and divisions within HHS, specifically OIG, ACF and CMS, because the requests sought records from these offices and therefore these offices were reasonably likely to possess responsive documents. (*Id.* at ¶¶ 6-10.) Eckert's office responded to all five requests, releasing approximately 830 pages of documents and withholding 298 pages pur-

suant to Exemption (b)(5), and withholding small portions of 260 pages under Exemptions (b)(4) and (b)(6). (*Id.* at ¶ 13.) Subsequently, Eckert's office released an additional 94 pages of documents. (*Id.* at ¶ 16.) Eckert further stated that there were no other reasonably likely locations for responsive documents. (*Id.* at ¶¶ 6-10.) Eckert does not provide any other information regarding the search for responsive documents.

Declarations of Katherine Hooten

HHS produced two declarations from Katherine Hooten. The first one is dated January 13, 2006 ("Hooten Decl. I") and is attached as Exhibit D to HHS's memorandum of law in support of its motion for summary judgment (Doc. No. 9). Katherine Hooten is the Freedom of Information Specialist for ACF and her duties include assembling ACF documents and recommending whether ACF documents should be released or withheld, and identifying corresponding exemptions if withholding is recommended. (Hooten Decl. I at ¶ 1.) Hooten explained that pursuant to a telephone conference she had on July 18, 2005 with counsel for the Commonwealth, Jason Manne, she referred his request in Case No.2005-0952-FW to the Office of Family Assistance ("OFA") and Administration for Children, Youth and Families ("ACYF"). (*Id.* at ¶ 6.) Both offices reported that they did not have any records responsive to the Commonwealth's request. (*Id.*) However, neither office indicated who conducted the search, the search terms used, or identified the particular files searched.

Hooten further explained that she forwarded the Commonwealth's request in Case No.2005-0951-MB to ACYF and HHS Region III, because ACYF is primarily responsible for administering federal child welfare programs and HHS Region III includes the State of Pennsylvania, and therefore, any agreements between ACF and OIG regarding review of Pennsylvania's Title IV-E claims were probably located there. (*Id.* at ¶ 8.) Both locations forwarded responsive documents, some of which were redacted to withhold personal, identifiable information of children in the foster care system. (*Id.*). No other details were provided as to who conducted the search, the search terms used, or identified the particular files searched. Finally, Hooten stated there were no other likely locations for responsive documents. (*Id.*)

***10** Hooten next explained that she forwarded the Commonwealth's FOIA request in Case No.2005-1000-RE to ACYF and HHS Region III, because these offices were likely locations of records pertinent to the decision to audit Pennsylvania's title IV-E program. (*Id.* at ¶ 10.) The results of the search located the same documents retrieved in response to the FOIA request in Case No.2005-0951-MB which were forwarded to Eckert. (*Id.*) No other details were provided as to who conducted the search, the search terms used, or identified the particular files searched. Finally, Hooten stated there were no other responsive documents or likely locations for responsive documents. (*Id.*)

In response to the Commonwealth's argument in opposition that Hooten's declaration fails to explain how the searches were conducted, HHS filed the supplemental declaration of Katherine Hooten dated June 21, 2006 ("Hooten Decl. II") (attached as Exhibit J to HHS's Reply Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Rule 56(f) Motion) (Doc. No. 17)). In her supplemental declaration, Hooten provides information regarding who conducted the searches and the files searched in response to the FOIA requests in Case Nos.2005-0952-FW and 2005-0951-MB. In particular, as to the FOIA request in Case No.2005-0952-FW for interagency agreements between OIG and ACF and OIG and CMS, Hooten states that the searches were conducted by a "Program Analyst" within OFA; the "Team Leader for Audit Liaison/Debt Management Team, Division of Financial Integrity, Office of Financial Services, Office of Administration/ACF"; and within ACYF, a "Program Manager in Child Welfare of Region III," a "Policy Specialist," and the "Director of Program Implementation." FN25 (Hooten Decl. II at ¶ 4.) The program analyst with OFA searched OFA's Program Policy Files, which include the Intranet policy file and the paper program files and contain all of the documents in OFA, for any agreements between OIG and ACF regarding audits of ACF programs. The program analyst also consulted with the Director of

Division of State TANF Policy and they agreed that if any agreement existed it would be located in the Office of Administration. The Team Leader then searched the OIG Website for work plans for fiscal years 2006, 2005 and 2004, without locating any of the requested interagency agreements. Within ACYF, the program manager, policy specialist, and director of program implementation searched all electronic and paper files for any agreements between OIG and ACF regarding audits of ACF programs. Hooten then indicated that there were no other likely locations for responsive documents to the FOIA Request in Case No.2005-0952-FW.

> FN25. Hooten does not specifically identify the searchers by name.

The Commonwealth submits that Hooten's supplemental declaration is still deficient with regard to the June 29, 2005 FOIA request for certain interagency agreements with OIG (Case No.2005-0952-FW), as Hooten fails to list the specific files searched or the search terms used, fails to describe the structure of the agency's file systems, and therefore, the declaration fails to provide evidence of a systematic approach to document location. Specifically, the Commonwealth takes issue with Hooten's failure to explain (1) why she limited her search to OFA when the FOIA request covered all programs with ACF, and (2) why it was reasonable for HHS to search OFA Program Policy files when looking for intra-agency agreements which would more likely be found in administrative type files. The Commonwealth further argues that Hooten's assertion that the OFA Intranet policy file and paper program files contain all the documents in OFA fails to take into account any files maintained by individual employees, such as correspondence files and administrative files. Next, although it was determined by the OFA program analyst and Director of Division of State TANF Policy that the Office of Administration was the likely location for any intra-agency agreements, the Commonwealth notes that the team leader does not appear to have searched the files at the Office of Administration, but rather, this unnamed individual searched the "OIG Website for work plans for Fys 2006, 2005, and 2004." The Commonwealth takes issue with both the failure to search the files of the Office of Administration and Hooten's failure to explain why it is reasonable to search for intra-agency agreements on a website containing work plans, when intra-agency agreements are internal documents that would not ordinarily be publicly posted.

***11** As to the FOIA request in Case Nos.2005-0951-MB and 2005-1000-RE for any agreements or discussions between, and any decisions by, ACF, David Lett, and/or all ACF staff and OIG, regarding a review or audit of Pennsylvania's Title IV-E claims/programs, Hooten avers in her supplemental declaration that the searches were conducted within ACYF by "several Policy Specialists" and the "Director of Program Implementation"; and within Region III, by a "Program Manager in Child Welfare", a "Grants Officer", and a "Program Specialist in Child Welfare." FN26 (Hooten Decl. II at ¶ 5.) According to Hooten, the files searched by these individuals consisted of "electronic and paper files" within ACYF; "Region III's electronic and paper Title IV-E files"; the "Child Welfare Unit's Title IV-E official program files for Pennsylvania (which contain letters and reports by year);" the "individual electronic files for any emails or reports involving Pennsylvania Title IV-E information;" and the "Regional Office's grants management files for Pennsylvania's Title IV-E program." (*Id.*)

> FN26. Hooten does not specifically identify the searchers by name.

The Commonwealth contends that Hooten's supplemental declaration does not evidence a systematic approach to the search conducted by the unnamed policy specialists and the director of program implementation within ACYF because it states only that these unnamed individuals searched unspecified electronic and paper files. Moreover, the Commonwealth contends Hooten fails to provide the search terms used, denote which files were searched, or explain the structure of agency filing system, and fails to indicate whether the files of the individuals involved with Pennsylvania's OIG audits were searched. With regard to the searches conducted within Region III by an unnamed program manager, grants officer and program specialist, the Commonwealth again takes issue with Hooten's failure to specify the search terms

used or explain the structure of the agency files withing Region III. In addition, the Commonwealth notes Hooten's supplemental declaration does not indicate that individual employees' *paper* files were searched and withholds the names of the individuals whose electronic files were searched, thereby precluding the Commonwealth from determining whether HHS searched the files of all individuals it knows were involved with the OIG audits.

Declaration of Diane J. Diggs

HHS produced one declaration from Diane J. Diggs, dated December 7, 2005 ("Diggs Decl.") which is attached as Exhibit E to HHS's memorandum of law in support of its motion for summary judgment (Doc. No. 9). Diane Diggs is the Freedom of Information Specialist for the Office of Secretary, Office of Inspector General, Department of HHS, and her duties include assembling OIG documents in response to a FOIA request and recommending whether OIG documents should be released or withheld and identifying corresponding FOIA exemptions if withholding is recommended. (Diggs Decl. at ¶ 1.) When she receives a FOIA request from HHS's FOI/PA Division, Diggs stated that she logs it into her database. (*Id.* at ¶ 2.) Diggs then forwards the request to the component within OIG, including OIG regional offices, which she believes may have responsive documents. (*Id.* at ¶ 3.) All five FOIA requests were forwarded to Diggs for processing. (*Id.* at ¶ 4.) With regard to all five FOIA requests, Diggs determined that the Office of Audit Services ("OAS") within OIG was the likely location to have responsive documents because OAS is responsible for: (1) the performance of audits relative to ACF and CMS programs; (2) conducting audits of HHS programs and grantees, including Title IV-E audits; (3) all ongoing audits by OIG of Title IV-E programs; and (4) policy decisions regarding whether a HHS program or grantee should be audited by the OIG. (*Id.* at ¶¶ 6, 8, 10, 11, 13.) Therefore, Diggs forwarded all five FOIA requests to OAS. Documents responsive to all five FOIA requests were located and retrieved from the records maintained in the Audit Office Program Files, photocopied and sent to HHS's FOI/PA Division. (*Id.*) No further information regarding the search is provided. Diggs further stated that there were no other likely locations for responsive records. (*Id.*)

***12** In response to Digg's declaration, the Commonwealth argues that she fails to explain or otherwise identify the "Audit Office Program Files" and her declaration is uninformative regarding the search methodology.

Declarations of Frank T. Connors

HHS produced two declarations from Frank T. Connors. The first one is dated April 13, 2006 ("Connors Decl. I") and is attached as Exhibit F to HHS's memorandum of law in support of its motion for summary judgment (Doc. No. 9). Frank Connors is the Program Analyst for OAS, Office of Inspector General, Department of HHS, and his duties include reviewing FOIA requests, coordinating searches for responsive documents within OAS, and assembling OAS documents for submission to OIG. (Connors Decl. I at 1.) When he receives a FOIA request from OIG, Connors stated that he logs it into his database. (*Id.* at ¶ 4.) Connors received all five FOIA requests from Diane Diggs. (*Id.* at ¶ 5.) With regard to these requests, Connors essentially identifies by title the individuals within OAS, Region III, Grants and Internal Activities ("GIA") Division, and the Office of Counsel to the Inspector General ("OCIG"), with whom he consulted and/or referred the document requests, and explains why these offices/divisions are likely to have any responsive documents. Connors goes on to state whether these individuals located any responsive documents after conducting a search. However, other than indicating that the responsive records were maintained in the "Audit Office Program Files," no other information is given regarding the search terms used, the structure of the agency's file system, or the names of the specific files searched.

In response to the Commonwealth's brief in opposition challenging the sufficiency of Connors' first declaration as completely lacking any details regarding the search terms or methodology used, and the structure of the agency's filing system, HHS filed the supplemental declaration of Frank T. Connors dated June 21, 2006 ("Connors Decl. II") (attached as Exhibit K to the reply memorandum in support of HHS's motion for summary judgment and opposition to

Plaintiff's Rule 56(f) motion (Doc. No. 17)). In his supplemental declaration, Connors first explains that the files in OAS are know simply as "program audit files" or "audit work files." (Connors Decl. II at ¶ 4.) He then goes on to explain, in some detail, the search process employed for the first FOIA request dated June 29, 2005 (Case No.2005-0952-FW). Connors consulted with a senior auditor within OAS who conducted a search of paper and electronic work files for any inter-agency agreements between OIG and ACF regarding the performance of audits going back six years from 2005. (Connors Decl. II at ¶ 5.) Connors also consulted with other staff members and he details the searches conducted by these individuals regarding the second, third and fourth items in this FOIA request.

With regard to OAS's processing of the second FOIA requests dated June 29, 2005 (Case No.2005-0951-MB), Connors explained that a Supervisory Auditor within the GIA Division, a Supervisory Auditor within Region III, and a senior attorney within the OCIG searched paper and electronic audit work files for the period 1997-2002 for all documents, including e-mail, file notes, meeting notices, and correspondence, evidencing or discussing any agreement between ACF, its Regional Administrator, David Lett, and OIG relative to a review of Pennsylvania's Title IV-E claims. (*Id.* at ¶ 6.) Connors further stated that the searches conducted by the Supervisory Auditors at GIA and Region III, and the senior attorney at OCIG located responsive documents maintained in paper and electronic audit work files and these documents were forwarded to him in paper form. (*Id.*)

***13** With regard to the third FOIA request dated June 30, 2005 (Case No.2005-0953-RE) requesting all documents relating to all child eligibility review instruments used by OIG auditors in ongoing or completed audits of Title IV-E maintenance payments made by States and local governments, Connors explained that a Supervisory Auditor within GIA searched all paper and electronic audit work files for responsive documents and did not locate any documents within the scope of the request. (*Id.* at 7.) Supervisory Auditors within Regions I, II and III also searched all paper and electronic audit work files for documents responsive to the third FOIA request and located and submitted all responsive documents. (*Id.*) Supervisory Auditors from Regions IV, V and IX each searched paper and electronic audit work files within their respective offices but had no responsive documents. (*Id.*) A senior attorney from OCIG also searched paper and electronic audit work files for documents responsive to the third FOIA request but did not locate any documents within the scope of the request. (*Id.*)

With regard to the fourth FOIA request dated June 30, 2005 (Case No.2005-0954-mb), Connors explained a Supervisory Auditor provided him with the requested list of all ongoing audits of Title IV-E programs in paper form, from an electronic audit work file. (*Id.* at ¶ 8.)

As to the fifth FOIA request dated July 19, 2005 (Case No.2005-1000-RE), requesting all documents post 1997 relating to decisions by ACF and OIG to subject Pennsylvania's Title IV-E program to audit by OIG, including discussions by ACF staff, ACF Regional Administrator David Lett, or OIG staff regarding same, and the decision of OIG to include a cost analysis of Title IV-E provider rates in its audit of Pennsylvania's Title IV-E program, Connors stated that a Supervisory Auditor within GIA, a Supervisory Auditor within Region III, and a senior attorney within OCIG all searched paper and electronic audit work files from 1997 to present for responsive documents. (*Id.* at ¶ 9.) Connors further stated that all three individuals located and forwarded responsive documents maintained in paper and electronic audit work files to Connor in paper form. (*Id.*)

However, in its supplemental reply brief, the Commonwealth challenges Connors' supplemental declaration as still devoid of either a description of the search terms used to search these "electronic" or "paper" files, or the names of the particular folders within the program audit files or audit work files which were searched. The Commonwealth also contends that the search is deficient in that none of the individuals with whom Connors consulted regarding the search for responsive records indicated that the personal filing systems and computer hard drives of individual employees were searched, or that either

the "program audit files" or "audit work files" contained the files of any individuals, including the ACF staff and David Lett.

Declaration of Michael S. Marquis

***14** Finally, HHS presented one declaration from Michael S. Marquis dated January 24, 2006 ("Marquis Decl."), which is attached as Exhibit G to HHS's memorandum of law in support of its motion for summary judgment (Doc. No. 9). Michael Marquis is the Director of the Freedom of Information Group ("FIG"), Office of Strategic Operations and Regulatory Affairs, Centers for Medicare and Medicaid Services ("CMS"), U.S. Department of HHS, and as such, is the Records Access Officer for CMS. Marquis's duties include responding to FOIA requests for records of CMS, determining whether to release or withhold records or portions of records, and overseeing all FOIA activities within CMS. (Marquis Decl. at ¶ 1.) Marquis received from HHS FOI/PA Division one FOIA request dated June 29, 2005 for interagency agreements between OIG and CMS for the performance of audits relative to CMS programs (Case No.2005-0952-FW). (*Id.* at ¶ 4.) In his declaration, Marquis identifies the offices/divisions likely to possess responsive documents,[FN27] and the basis for this conclusion, *i.e.*, generally the relationship between the office/division and the documents requested. Marquis does not provide any detail regarding the types of files searched or the structure of the referred offices' file systems. Marquis does indicate that the searches conducted by the offices to whom he forwarded the FOIA request resulted in the retrieval of approximately 174 pages of responsive records from OAGM and OFM, which were forwarded to HHS's FOI/PA Division. (*Id.* at ¶¶ 7, 10.) Marquis further stated that there were no other likely locations for responsive documents and all located responsive documents were provided to HHS's FOI/PA Division. (*Id.* at ¶¶ 9, 12.)

> FN27. The offices/divisions to which Marquis referred the FOIA request include: Office of Strategic Operations and Regulatory Affairs ("OSORA"); Office of Acquisition and Grants Management ("OAGM"); the Center for Beneficiary Choices ("CBC"); the Center for Medicaid and State Operations ("CMSO"); and CMS's Office of Financial Management ("OFM"). (Marquis Decl. at ¶¶ 5, 6, 8.)

The Commonwealth objects to the sufficiency of the Marquis declaration, for essentially the same reasons given as to the four previous declarations: Failure to identify the specific files searched and to explain the manner in which the search was conducted.

Reviewing the declarations of Eckert, Hooten, Diggs, Connors, and Marquis, the following conclusions can be drawn regarding the adequacy of the searches. Based on the information requested in the five FOIA requests, it was determined by the declarants that responsive materials were most likely located within the following agencies, offices, and/or divisions of HHS: ACF, and its offices/divisions OFA, ACYF; the regional offices of HHS Regions I, II, III, IV, V, and IX; OIG and its offices/divisions OAS, GIA, and OCIG; and CMS and its offices/divisions OSORA, OAGM, CBC, CMSO, and OFM. Collectively, the declarants adequately explained how and why a particular FOIA request was referred to a particular agency/office/division. The declarants also stated that these offices/divisions were searched because they were the likely locations for records responsive to the five FOIA requests submitted by the Commonwealth. In addition, the declarants indicated the filing systems or types of files searched, *i.e.*, "Audit Office Program Files," "Program audit files," or "audit work files," and within these files, whether both paper and/or electronic files were searched, and in some cases, whether individual files maintained by employees/staff were searched. Moreover, the Court notes that through their respective positions within HHS and its offices and divisions, the declarants are charged with the responsibility of processing all FOIA requests referred to HHS or their agency/office/division, and therefore, are deemed to have some expertise in processing FOIA requests. Indeed, the Commonwealth has not pointed to any reason or basis for a contrary conclusion. Accordingly, the Court finds the declarations provide sufficient factual detail to show that the searches were reasonably calculated to uncover the records requested by the Commonwealth and indeed, HHS produced approximately 925 documents (260

pages of which contained redactions of personal information pursuant to Exemptions (b)(4) and (b)(6)), thereby demonstrating that HHS searched the appropriate offices for responsive documents. Inasmuch as the Commonwealth has failed to provide any rebuttal evidence showing the searches were not conducted in good faith, the Court finds HHS has met its burden regarding the adequacy of the search. Therefore, the Court finds that HHS is entitled to summary judgment with regard to the adequacy of the search. FN28

FN28. The Court finds no merit to the Commonwealth's argument that HHS's failure to specifically identify the names of the employees and/or staff who maintained individual files and to indicate whether these particular files were searched precludes the Commonwealth from a meaningful opportunity to contest the adequacy of the search. HHS provided the Commonwealth with approximately 925 pages of documents. Certainly, the Commonwealth has had an adequate opportunity to review these documents and determine whether there appear to be any missing documents from individuals with whom the Commonwealth has dealt with regard to the Title IV-E audits and which the Commonwealth has reason to believe exist and were not produced. Yet, in its submissions to this Court, the Commonwealth does not identify any individuals whose records appear to be missing. Accordingly, the Commonwealth's argument amounts to nothing more than speculation as to what types of records might theoretically exist based on its prior dealings with HHS, rather than on any actual evidence of overlooked materials. Such speculation is insufficient to raise an issue of material fact with regard to the adequacy of the search. *Steinberg*, 23 F.3d at 552 (citing *SafeCard*, 926 F.2d at 1201); *Lee*, 235 F.R.D. at 288 (citing *SafeCard, supra*).

2. Reasonably Segregable Factual Material

***15** The Commonwealth also challenges the adequacy of HHS's proof in support of its statement that it has released all reasonably segregable factual information. First, the Commonwealth argues that HHS's declarations and *Vaughn* indices are legally deficient with regard to the required factual details and explanation necessary to show that all reasonably segregable factual information has been released. In support of this argument, the Commonwealth cites *Krikorian v. Dep't of State*, 984 F.2d 461, 466-67 (D.C.Cir.1993), and *Rugerio v. U.S. Dep't of Justice*, 257 F.3d 534, 553 (6th Cir.2001). Second, the Commonwealth offers evidence of bad faith on the part of HHS with regard to segregability by pointing to one of the withheld pages for which HHS is claiming an exemption under 5 U.S.C. § 552(b)(5), but which the Commonwealth obtained outside the FOIA request, *i.e.*, Bate-stamped page no. 545. With regard to page no. 545, the Commonwealth argues that there are non-exempt portions of that page which reasonably could have and should have been segregable from the exempt portion and therefore disclosed. HHS counters that based on the supplemental declaration of Robert Eckert and its *Vaughn* indices, it has conducted a satisfactory segregability analysis and released all segregable factual material. For the reasons set forth below, the Court finds the Commonwealth's arguments have substantial merit and recommends summary judgment be denied on this issue.

HHS also has the burden of demonstrating that it has released all reasonably segregable portions of each of the withheld documents or portions of documents, or providing a factual recitation as to why certain materials are not reasonably segregable. *Davin*, 60 F.3d at 1052 (citing 5 U.S.C. § 552(a)(4)(B)). Because the emphasis of FOIA is on *information* rather than documents, an agency cannot base withholding an entire document or page of information simply on a showing that it contains some exempt material. *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C.Cir.1977) (emphasis added). In 1974, Congress amended FOIA to specifically incorporate this requirement. *See* 5 U.S.C. § 552(b) . FN29 In the District of Columbia Court of Appeals, it has been clearly established that "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central*, 566 F.2d at 260 (citations omitted).

> FN29. Section 552(b) states in relevant part: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under [§ 552(b)]."

In determining whether the agency has satisfied its burden on segregability, the court must narrowly construe the exemptions with the focus on disclosure. *Davin*, 60 F.3d at 1052 (citing *Wightman v. Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979, 982 (1st Cir.1985)). A conclusory statement to the effect that the agency has provided the requestor with all reasonably segregable portions of the non-exempt information, without any supporting justification, will not satisfy the agency's burden regarding segregability on summary judgment. *Davin*, 60 F.3d at 1052; *Mead Data Central*, 566 F.2d at 261. Rather, the agency must provide a detailed justification for its decision that non-exempt material is not segregable, which includes a description of "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead Data Central*, 566 F.2d at 261 (footnote omitted). In determining whether the agency has satisfied its burden of proof regarding segregability, the Court of Appeals in *Davin* required the agency to "describe the process by which [it] determined that all reasonably segregable material of each of the withheld documents or portions of documents had been released" and to "provide a factual recitation of why certain materials [were] not reasonably segregable ." *Davin*, 60 F.3d at 1052. The Court of Appeals rejected as wholly conclusory a declaration that was "comprised of assertions that documents were withheld because they contain the type of information generally protected by a particular exemption." *Id.*

***16** Moreover, it is of no moment for the agency to argue that this process will cause it to incur significantly increased costs. As the Court of Appeals explained in *Mead Data Central*, these "burdens may be avoided at the option of the agency ... by immediate disclosure." 566 F.2d at 261. The Court of Appeals further opined:

Requiring a detailed justification for an agency's decision that non-exempt material is not segregable will not only cause the agency to reflect on the need for secrecy and improve the adversarial position of FOIA plaintiffs, but it will also enable the courts to conduct their review on an open record and avoid routine reliance on in camera inspection. It is neither consistent with the FOIA nor a wise use of judicial resources to rely on in camera review of documents as the principal tool for review of segregability disputes. See *Vaughn I, supra*, 484 F.2d at 825-26.... If an agency has provided the description and justification suggested by this opinion, a district court need not conduct its own in camera search for segregable non-exempt information unless the agency response is vague, its claims too sweeping, or there is a reason to suspect bad faith. [*Weissman v. CIA*], 565 F.2d 692, at 697-698 [(D.C.Cir.] 1977).

Mead Data Central, 566 F.2d at 216-62 (footnotes omitted).

In the case at bar, the only declaration submitted initially by HHS to satisfy its burden of proving that all reasonably segregable, non-exempt material was released is that of Robert Eckert (Eckert Decl. I).[FN30] At the end of his first declaration, Eckert states in conclusory fashion that "[a]ll reasonably segregable, non-exempt information has been released. For records withheld in their entirety, there was no reasonably segregable, non-exempt information ." (Eckert Decl. I at ¶ 20.) In response to the Commonwealth's argument in opposition that such a conclusory statement without any explanation is insufficient to satisfy its burden, HHS filed the supplemental declaration of Robert Eckert dated June 19, 2006 ("Eckert Decl. II") (attached as Exhibit L to HHS's Reply Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Rule 56(f) Motion) (Doc. No. 17)). In his supplemental declaration, Eckert states that he evaluated "each individual piece of information with careful consideration to determine segregability." (Eckert Decl. II at ¶ 5.) In this regard, Eckert further stated:

> FN30. HHS also provided the declarations of Michael Leonard (Exhibit H) and Richard Stern (Exhibit I) in support of its motion for summary judgment with regard to its decision to withhold approximately 202 pages

> of responsive documents. However, neither of these declarations addresses the decision-making process and/or justification for finding that "[a]ll reasonably segregable, non-exempt information has been released. For records withheld in their entirety, there was no reasonably segregable, non-exempt information."

Documents were withheld in full either because all the information contained in the documents was exempt from disclosure or the redaction of exempt material would have left only mere templates or unintelligible or meaningless words and phrases because such non-exempt information was so inextricably intertwined with exempt material. For example, in some instances, what would remain after the redaction of the exempt information would have little or no value, amounting to barely more than the date of the draft or the email transmitting such draft and the names of the parties and the subject line-all information contained in the Vaughn index. In other instances, the withheld material contains confidential communications including facts and materials submitted in confidence to an attorney for purposes of seeking legal advice. In still other instances, the withheld material contains attorney work-product, including both factual and deliberative material, prepared in reasonable anticipation of litigation.
*17 Eckert Decl. II at ¶ 6. Finally, regarding Bate-stamped page no. 545 which HHS withheld in its entirety but which the Commonwealth was able to obtain outside of the FOIA request, Eckert stated that he made the determination to withhold page no. 545 under the deliberative process privilege of Exemption (b)(5), and still maintains that page no. 545 is exempt as deliberative, even after learning that the Commonwealth possessed a copy of that page. (*Id.* at ¶ 7.) Eckert disclaimed any prior knowledge that the Commonwealth possessed page no. 545 or how the Commonwealth came to possess it. (*Id.*)

The Court finds that HHS's supporting evidence is woefully inadequate on segregability. First of all, the explanation of Robert Eckert paints with too broad a brush-he speaks in general terms, without any identification of the specific pages to which the explanation is said to apply. This approach was specifically rejected by the Courts of Appeals in *Mead Data Central* and *Davin, supra.* In addition, for each page withheld in its entirety, HHS fails to provide a factual recitation as to why the information on that page was not reasonably segregable.

Second, the required explanation also cannot be found in the *Vaughn* indices provided by HHS, despite HHS's representation that its *Vaughn* indices "specify in detail which portions of the documents are discloseable and which are exempt." *See* Reply Mem. in Supp. of Defs.' Mot. for Summ. J. & Opp'n to Pl.'s Rule 56(f) Mot. at 8. The "Bases for Exemption" set forth in the *Vaughn* Index assert that the documents were withheld because they contain the type of information generally protected by a particular exemption and, in some instances, provide additional detail regarding the contents of the documents to support application of the privilege claimed. However, none of the "Bases for Exemption" offers any explanation or description of how it was determined that all reasonably segregable, non-exempt portions of the documents were released, or that there was no reasonably segregable, non-exempt information.

HHS counters that under the attorney work-product privilege and attorney-client privilege, the release of segregrable factual information is not required, and cites in support of this argument, *Commonwealth of PA.*, 623 F.Supp. at 307 (release of segregable factual information is not required with regard to material appropriately withheld under the attorney work-product privilege). While that may be an accurate statement of the law, HHS must first demonstrate the applicability of the attorney work-product privilege under Exemption (b)(5) to the withheld pages in this case. As explained below, HHS has failed to satisfy its burden of proof in claiming the attorney work-product privilege. Accordingly, to the extent HHS has rested its segregability analysis on the attorney work-product privilege, its analysis is likewise flawed.

Third and finally, the Commonwealth has presented actual evidence of bad faith on the part of HHS relative to segregability. In this regard, the Commonwealth argues that the first paragraph on page no. 545

contains obviously segregable factual background material that was withheld without justification or explanation. Although the *Vaughn* Index describes page no. 545 as containing predecisional opinions and strategy, the Commonwealth submits that in actuality, the page communicates the fact that the Commonwealth rejected a settlement offer, and that OAS " 'may initiate completion of the review that began in 2000, pursuant to the agreement between ACF and the Office of the Inspector General....' " See Pl.'s Br. in Opp'n to HHS' Mot. for Summ. J. & in Supp. of its Rule 56(f) Mot. at 18 (quoting *Vaughn* Index of Withheld Documents from HHS Release Dated Jan. 5, 2006 for Case Nos.2005-1000RE and 2005-951MB at 18 (attached as Ex. 9 to Eckert Decl. I).) The Commonwealth contends that this page is clearly a non-exempt, post-decisional document that communicates a decision to another HHS component, and therefore, neither the claimed exemption nor the description in the *Vaughn* Index are supportable.

***18** The Court finds that the Commonwealth's point regarding page no. 545 is well-taken. An examination of page no. 545 reveals that the first paragraph [FN31] does indeed contain segregable, non-exempt, factual background information that does not involve predecisional opinions and strategy, as does the third paragraph.[FN32] Moreover, this factual information does not appear to be inextricably intertwined with exempt material, nor does it reveal the deliberative process within ACF, OAS, or OIG. Accordingly, at the very least, the first and third paragraphs of page no. 545 should have been released as segregable, non-exempt factual information.[FN33] The fact that HHS still maintains that page no. 545 is exempt in its entirety as deliberative, after receiving the Commonwealth's challenge, is troublesome.

FN31. The first paragraph of page no. 545 states: "Attached is correspondence from the Secretary, Pennsylvania Department of Public Welfare (DPW), that declined acceptance of the Administration for Children and Families' (ACF) settlement offer pertaining to recovery of overpayments for ineligible recipients in the Title IV-E Foster Care Program for Federal Fiscal Years 1998, 1999, and 2000." *See* Exhibit B to Pl.'s Rule 56(f) Declaration dated June 2, 2006 (Doc. No. 14).

FN32. The third paragraph of page no. 545 reads as follows: "If you have any questions, please contact me at 215/861-4000, or have your staff contact Michael Rolish, Grants Officer, at (215) 861-4016." *See id.*

FN33. Arguably, the only portion of page no. 545 that falls within the deliberative process privilege is the second paragraph, which states: "The Office of Audit Services may initiate completion of the review that began in 2000, pursuant to the agreement between the ACF and the Office of Inspector General, to determine the full extent to which DPW's claims are ineligible for FFP." *See id.* This argument is addressed in Part 3, *infra.*

Accordingly, the Court finds that HHS has failed to satisfy its burden of proof with regard to segregability and therefore recommends that summary judgment be denied on this issue.

3. Withholding Documents Based on Exemption (b)(5)

In this case, the claimed exemption for the 196 pages of responsive materials in dispute is Exemption (b)(5) of FOIA, which allows a government agency to withhold responsive records to a FOIA request that consist of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]" 5 U.S.C. § 552(b)(5). Stated another way, "if a particular document falls within a recognized evidentiary privilege and, hence, would not normally be discoverable by a private party in the course of civil litigation with the agency, then the document likewise falls within the scope of Exemption 5 and is not releasable under the FOIA." [FN34] *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772 (D.C.Cir.1978), *overruled in part on other grounds* in *Crooker v. Bureau of ATF*, 670 F.2d 1051 (D.C.Cir.1981)(en banc)). This exemption has been construed to encompass three privileges: the deliberative process privilege, the attorney work-product privilege, and the at-

torney-client privilege. *See* EPA v. Mink, 410 U.S. 73, 85-90, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973) (deliberative process privilege); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (attorney work-product privilege); and Mead Data Central, 566 F.2d at 252-55 (attorney-client privilege). All three of these privileges have been asserted by HHS in this case.[FN35]

FN34. Although roughly based on discovery principles, exemption (b)(5) differs fundamentally in that a key ingredient for discovery, relevance, plays no part in FOIA cases. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C.Cir.1980) (citing EPA v. Mink, 410 U.S. 73, 86, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973)); *see also* Mead Data Central, 566 F.2d at 252 (citing *EPA v. Mink, supra*).

FN35. HHS claims the deliberative process privilege as to all 202 withheld pages, and for 104 of these pages, it is also claiming the attorney-client privilege; it is also claiming the attorney-work product privilege for 133 of the 202 withheld pages.

In support of its motion for summary judgment on the issue of withholding under Exemption (b)(5), HHS argues that it has provided sufficient descriptions for each withholding in its *Vaughn* indices to satisfy its burden on summary judgment to show that the documents or information are exempt from disclosure under Exemption (b)(5). HHS further argues that paragraphs 18 and 19 of Eckert's first declaration, as well as the declarations of Stern and Leonard, underscore that the documents withheld under Exemption (b)(5) generally consisted of drafts, predecisional advice, recommendations, suggestions, opinions, as well as confidential attorney-client communications and attorney work-product concerning an audit of Pennsylvania's foster care program, and therefore, HHS has demonstrated that it reasonably withheld the challenged documents under FOIA Exemption (b)(5).

***19** The Commonwealth disputes that the *Vaughn* indices and declarations submitted by HHS provide sufficient detail to support the claimed privileges and therefore argues HHS has failed to carry its burden to entitle it to summary judgment on this issue.

The Attorney-Client Privilege

The attorney-client privilege is intended to protect " 'only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." ' Coastal States Gas Corp., 617 F.2d at 862-63 (quoting Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)).[FN36] The purpose behind this privilege is to encourage a relationship of trust and free discussion between attorneys and their clients. Id. at 862; Mead Data Central, 566 F.2d at 253. Therefore, the application of this privilege is not restricted to communications that are made in relation to litigation or to a particular dispute, but extends to all situations in which an attorney's counsel is sought on a legal matter. Coastal States Gas Corp., 617 F.2d at 862. However, a fundamental prerequisite to assertion of the privilege is the demonstration of "confidentiality both at the time of the communication and maintained since. The burden is on the agency to demonstrate that confidentiality was expected in the handling of these communications, and that it was reasonably careful to keep this confidential information protected from general disclosure." Id. at 863. The test applied by the courts in determining confidentiality is "whether the agency is able to demonstrate that the documents, and therefore the confidential information contained therein, were circulated no further than among those members 'of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication." Id. (quoting Mead Data Central, 566 F.2d at 253 n. 24). "If the information has been or is later shared with third parties, the privilege does not apply." Mead Data Central, 566 F.2d at 253 (footnote omitted).

FN36. There is no question that this privilege applies to agency attorneys and their clients, *i.e.*, the agencies. *See, e.g.*, Coastal States Gas Corp., 617 F.2d at 863; Mead Data Central, 566 F.2d at 252.

One of the measures used to determine confidentiality is the degree of care exhibited in the handling of

the documents. *Coastal States*, 617 F.2d at 864. In this regard, the courts should ask what evidence exists to indicate that the person requesting the advice from the agency attorney had any expectation of confidentiality. *Id.* In *Coastal States*, the court of appeals found there was no evidence in the record from which it could conclude that there was any expectation of confidentiality. In support of its conclusion, the court of appeals noted the agency failed to establish that some attempt had been made to limit disclosure of the confidential documents to appropriate agency personnel, or that it made any attempt at all to protect the confidential communications within the agency, as the agency admitted that it did not know who had access to the documents, and undisputed testimony existed to the effect that in some regions copies of the memoranda were circulated to all area offices, filed and indexed for future reference, relied on as precedent, and used as training materials for new personnel. *Id.* at 863-64.

***20** In a prior FOIA case between the same parties to the instant litigation, the district court found that HHS failed to establish the confidentiality of the documents for which it was claiming nondisclosure under the attorney-client privilege. In the 1985 case between the Commonwealth and HHS, HHS provided a *Vaughn* index and two affidavits in support of its claimed exemptions for withholding fifteen documents. 623 F.Supp. at 305. The *Vaughn* index in the 1985 case set forth the date, author, recipient, subject matter, length of each document, the circumstances of its preparation, and the exemptions being claimed. The affidavits of two agency attorneys provided greater detail regarding the preparation of the withheld documents, 11 out of 15 of which were claimed to have been generated in preparation for litigation before the Grant Appeals Board. Although the district court found that given the detail of its affidavits and *Vaughn* index, HHS met its burden of providing the Commonwealth with sufficient information to effectively challenge the claimed exemptions for 15 documents, the court nonetheless concluded that HHS had not met its burden of proving the application of the attorney-client privilege to 8 of the withheld documents. *Id.* at 305-06. The district court found that at best, the *Vaughn* index and affidavits showed only that documents 2-9 were intended to be confidential at the time they were made. *Id.* The district court found lacking any assertion or proof that the matter discussed in the documents remained confidential at the present time, "or that the documents were circulated only to those in the agency authorized to speak or act for the agency on the subject matter of the communications." *Id.* at 306.

In the present action, HHS asserts the attorney-client privilege for 104 of the 196 withheld pages,[FN37] and in support thereof, offers the explanations contained in its *Vaughn* indices supplemented by the declarations of Michael Leonard and Richard Stern. In its *Vaughn* indices, HHS states as the basis for claiming the attorney-client privilege, for almost all of the pages withheld under this privilege, that "in addition," or "further," or "moreover," "the withheld material contains confidential attorney-client communications." This is the only explanation provided in the *Vaughn* indices for 81 of the pages withheld under the attorney-client privilege.[FN38] These 81 pages contain the following Bate-stamp page numbers: 490-91, 499, 500-06, 512, 529, 530, 533, 542, 831, 832, 839, 84-85, 89-90, 92-93, 97, 99-100, 101-02, 103, 104-05, 205-08, 209-11, 212-15, 223-24, 241, 242, 243, 248, 249-50, 251, 252-53, 254-55, 256-57, 258-59, 260-61, 262-64, 265, 266-67, 268, 269, 270-71, 280-84, 287-88, 292, and 465. This explanation alone is clearly insufficient to establish the confidentiality of the information contained in the withheld pages.

> FN37. The attorney-client privilege is asserted for the following Bate-stamp page numbers: 490-91, 499, 500-06, 512, 526-28, 529, 530, 533, 538, 539, 542, 584-86, 831, 832, 837, 838, 839, 84-85, 89-90, 92-93, 97, 99-100, 101-02, 103, 104-05, 112, 205-08, 209-11, 212-15, 223-24, 233-35, 241, 242, 243, 248, 249-50, 251, 252-53, 254-55, 256-57, 258-59, 260-61, 262-64, 265, 266-67, 268, 269, 270-71, 274-76, 277-79, 280-84, 287-88, 289-91, 292, and 465. In its opening memorandum of law in support of it motion for summary judgment ("HHS's opening memorandum"), HHS includes Bate-stamp page nos. 496, 556, 557, and

833 in the list of pages withheld under the attorney-client privilege. (Doc. No. 9 at page 25) However, an examination of the *Vaughn* indices reveals that the only claimed privilege for page nos. 496, 556, 557, and 833 is the deliberative process privilege. In addition, page nos. 233-35 are not included in HHS's list in its opening memorandum because these pages were added by the Commonwealth in its June 2, 2006 submission which post-dates the filing of HHS's opening memorandum.

FN38. Although the *Vaughn* indices do list the author and recipients of the documents (in most instances), the Court has no way of knowing if these individuals are authorized to act or speak on behalf of the agency on the subject matter of the communication.

For Bate-stamp page numbers 538, 539, 837, 838, and 112, the only explanation given by HHS in its *Vaughn* indices is "In addition, the withheld material contains confidential attorney-client communications pertaining to a legal matter for which client has sought professional advice." For three (3) pages, Bate-stamp page nos. 233-35, no explanation is given in the *Vaughn* index, other than the initial claim that the "withheld material is protected by the ... attorney-client privilege..." Again, these explanations alone are clearly insufficient to establish confidentiality.

***21** For 15 of the withheld pages under this privilege, Bate-stamp page nos. 526-28, 584-86, 274-76, 277-79, and 289-91, HHS provides the same statement as provided for the above 81 pages, but also adds that "The document is clearly marked as 'CONFIDENTIAL-ATTORNEY/CLIENT PRIVILEGED MEMORANDUM." ' While such a designation on the pages demonstrates the existence of an expectation of confidentiality, it still falls short of the required showing. Just because a document is designated as "CONFIDENTIAL-ATTORNEY/CLIENT PRIVILEGED" does not mean that the Court can assume that the information contained therein was continually maintained as such. HHS asks this Court to make too great of a leap, especially since it bears the burden of proving that the claimed privilege applies. HHS must meet this burden by providing evidence, either through affidavit or some other means, that established that the particular confidential materials have not been circulated beyond those authorized to speak on its behalf on the subject matter contained in the communication.

The Declaration of Michael Leonard ("Leonard Decl.") fails to add anything to support the application of the attorney-client privilege. Leonard is an attorney in Region III of the Office of the General Counsel (OGC) of HHS and he either authored or received nine (9) of the pages withheld by HHS. (Leonard Decl. at ¶¶ 1, 5.) Leonard addresses the attorney-client privilege claimed for seven (7) of these pages, Bate-stamp page numbers 490-91, 529, 530, and 262-64, in his declaration. However, he does not provide any more information or explanation regarding page numbers 529, 530, and 262-64, than that already contained in the *Vaughn* indices. (Leonard Decl. at ¶¶ 10-12.) For page nos. 490-91, Leonard adds only that he provided input into the draft letter and advice to HHS employees concerning the letter. (*Id.* at ¶ 7.) Leonard's declaration is completely devoid of any proof that there was an expectation of confidentiality or that the materials containing the confidential information were circulated no further than among the employees of HHS who are authorized to speak or act on behalf of it in relation to the subject matter of the communication.

Likewise, the Declaration of Richard Stern ("Stern Decl.") does not add significantly to the explanations provided in the *Vaughn* indices for the attorney-client privilege. Stern is an attorney in the OCIG of the OIG of HHS, and he either authored or received 85 of the pages withheld by HHS. (Stern Decl. at ¶¶ 1, 4-5.) Sixty (60) of these pages were withheld on the basis of the attorney-client privilege. For the following Bate-stamp page numbers, Stern stated merely that the pages contain a confidential exchange of emails between himself and agency attorneys and employees concerning either a draft document to the Commonwealth of Pennsylvania, or an audit of Pennsylvania's Title IV-E Foster Care Program or the Title IV-E audit: 490-91, 831, 832, 84-85, 90-90, 92-93, 101-02, 103, 241, 249-50, 251, 252-53, 254-55, 256-57, 258-59, 260-61, 262-64, 265, 266-67, 268, 269,

270-71, and 292. (*Id.* at ¶¶ 7, 9-11, 14, 16, 21-22, 32, 35-48.) Stern's explanation is simply a reiteration of that given in the *Vaughn* indices. For Bate-stamp page numbers 500-06, 104-05, 112, 209-11, 212-15, 223-24, 242, and 243, Stern stated that the pages contain a confidential legal memorandum, prepared by him to agency attorneys and/or employees regarding the audit of Pennsylvania's foster care claims or its Title IV-E program. (*Id.* at ¶¶ 8, 23-24, 29-31, 33.) Again, Stern's explanation adds nothing to the *Vaughn* indices. Finally, Stern stated that Bate-stamp page numbers 99-100 contain a confidential exchange of emails between himself and an agency attorney and agency employees regarding Title IV-E regulations. (*Id.* at ¶ 20.) Stern's explanation is simply a reiteration of that given in the *Vaughn* indices. However, at the end of his declaration, Stern makes the following statement with regard to all of the pages he authored or received:

22** The documents at issue contain confidential communications from OIG to me as OIG's attorney and vice versa, for the purpose of advising and assisting OIG, and in a few instances, their HHS partner in these activities, ACF, with legal issues. My advice in these communications was advisory in nature and did not represent statements of agency policy or the final agency decision on a particular matter. OIG attorneys provide options and advice to OIG, which the agency can choose to adopt or not, depending on both legal consequences and other policy considerations. *Moreover, both the attorneys and clients who received these communications had a clear expectation that they would remain confidential. Indeed, all e-mail communications from the Office of Counsel to the* ***Inspector General *include a warning that they contain information protected by the* ***attorney-client****, attorney work product, deliberative process,* or other privilege, or protected by Federal confidentiality laws.

Id. at ¶ 49 (emphasis added). Based on Stern's statement in paragraph 49, HHS has offered some evidence of an expectation of confidentiality. However, this offer of proof still falls short of the mark. Despite his statement that all e-mail communications from the Office of Counsel to the Inspector General contain a warning that the information contained therein is protected by various privileges, there is no indication in the *Vaughn* indices that this warning appears on the emails.[FN39] Moreover, most law firms and corporate and government legal departments include this warning on all of their emails as a matter of course. That does not mean, however that all of the information contained in those emails is confidential, or has continued to remain confidential. At best, Stern's declaration establishes an expectation of confidentiality at the time the document was drafted, but as explained earlier, this alone is not enough to carry HHS's burden. It is clear from the above case law that HHS must also establish that the pages for which it is claiming the attorney-client privilege were not circulated to any persons not authorized to speak on its behalf regarding the subject matter or to third parties. Currently, there is nothing in the record that allows the Court to make this conclusion.

> FN39. Yet, for Bate-stamp page nos. 526-28, 584-86, 274-76, 277-79, and 289-91, HHS's explanation of the attorney-client privilege included the confidentiality designation.

Since HHS bears the burden of proof on the application of a claimed exemption and it has failed to do so based on the attorney-client privilege, HHS will not be entitled to summary judgment on its withholding of the 104 pages unless it demonstrates that these within Exemption (b)(5) for some other reason.[FN40]

> FN40. A great deal of overlap exists between the attorney-client privilege and the deliberative process privilege of Exemption (b)(5), with respect to materials containing legal opinions and advice. *Mead Data Central*, 566 F.2d at 254 n. 28. However, these two privileges are distinct in that the "attorney-client privilege permits nondisclosure of an attorney's opinion or advice *in order to protect the secrecy of the underlying facts,* while the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part*